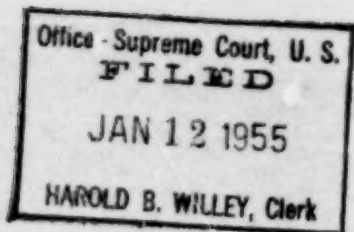


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TRANSCRIPT OF RECORD

United States Court of Appeals
TENTH CIRCUIT.

No. 4912.

BEN SAPIR, APPELLANT,

VS.

UNITED STATES OF AMERICA, APPELLEE.

**APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO**

FILED MAY 13, 1954.
SUPPLEMENTAL RECORD FILED MAY 29 & JUNE 7, 1954.

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IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT.

No. 4912.

BEN SAPIR, APPELLANT,

vs.

UNITED STATES OF AMERICA, APPELLEE.

Statement of Points Relied Upon for Reversal.

1. There is no substantial evidence to support the verdict of the jury.

2. The District Court erred in denying defendant's Motion for judgment of acquittal at the close of the Government's case.

3. The District Court erred in denying defendant's Motion for judgment of acquittal at the end of the entire case.

4. The District Court erred in denying defendant's Motion for judgment notwithstanding the verdict.

5. The District Court erred in instructing the jury as to the intent necessary to support a conviction, and further erred in refusing to give defendant's requested instruction reading as follows:

"You are instructed that before you can find the defendant, Ben Sapis, guilty of the crime of conspiracy, you must first find that he knew the aluminum was the property of the Government, and secondly, that he intended to conspire to steal such aluminum from the Government, and if you should find that Ben Sapis did conspire to steal the aluminum, but thought or intended to conspire to steal such aluminum from someone other than the Government, then you must bring in a verdict of acquittal."

Filed with proof of service May 26, 1954.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO.

PLEAS AND PROCEEDINGS BEFORE THE HONORABLE CARL A. HATCH, UNITED STATES DISTRICT JUDGE FOR THE DISTRICT OF NEW MEXICO, PRESIDING IN THE FOLLOWING ENTITLED AND NUMBERED CAUSE:

UNITED STATES OF AMERICA, PLAINTIFF,

vs.

BEN SAPIR, and HAROLD RICHARD CANFIELD,
DEFENDANTS.

No. 17,885 Criminal.

Indictment.

Sec. 371, Title 18, USC, Conspiracy to defraud and to commit offenses against the United States.

Sec. 641, Title 18, USC, Theft and concealing of Government property.

Sec. 201, Title 18, USC, Offer to bribe a person acting for and on behalf of the United States.

The Grand Jury charges:

Count I.

1 That on or about the 12th day of June, 1953, at Socorro, in the State and District of New Mexico, defendants Ben Saper and Harold Richard Canfield conspired, confederated and agreed with each other to commit an offense against the United States and to defraud the United States; the said conspiracy was formed between said defendants in substantially the following manner and for the following purposes: defendant Harold Richard Canfield was purchasing agent for the New Mexico Institute of Mining and Technology and as such purchasing agent was in charge of the sale of aluminum ingots derived by the said New Mexico Institute of Mining and Technology

from the melting of frames of United States Naval aircraft, said material being property of the United States; that defendant Ben Sapis had a contract to purchase said aluminum ingots from the New Mexico Institute of Mining and Technology by reason of a high bid by Sapis for said aluminum ingots at the figure of \$.1583 per pound; that Canfield and Sapis had agreed that the amount to be paid by Sapis for said aluminum ingots would be determined by weighing the railroad car in which said aluminum ingots were to be shipped and that all of said ingots would be shipped by rail.

2 On the 12th day of June, 1953, defendant Canfield agreed that defendant Sapis could take a truckload of ingots from Socorro to Albuquerque by truck, contrary to the previous agreement, and that Sapis would not be required to pay for said truckload and defendant Sapis agreed "to take care" of defendant Canfield.

To accomplish the objects of said conspiracy the defendants did and performed the following overt acts:

1. On June 12, 1953, defendant Sapis loaded a truckload of aluminum ingots at the New Mexico Institute of Mining and Technology and instead of allowing said ingots to be transferred to a railroad car in Socorro for shipment, Sapis caused said truck to be delivered directly to Albuquerque and prevented said quantity of ingots thereon from being weighed.

2. On or about June 13, 1953, at Albuquerque, defendant Sapis gave defendant Canfield the sum of \$200.00.

In violation of Section 371, Title 18, USC.

.

A True Bill:

H. B. HORN,
Foreman of the Grand Jury.

PAUL F. LARRAZOLO,
United States Attorney.

Filed Sept. 12, 1953.

Arraignment and Plea, September 15, 1953.

5 Mr. Borland: The next case, the defendant's name is Ben Sapis; No. 17,855. Your Honor, this was—there are two defendants in this indictment, and Harold Canfield I believe was arraigned yesterday.

The Court: Let the record show the defendant is present in person and accompanied by counsel.

Mr. Borland: His counsel has received a copy of the indictment.

Mr. Keleher: May the record show we desire the indictment be read into the record.

The Court: Let the indictment be read.

Mr. Borland: (Reads the indictment, Count I.)

Mr. Keleher: To which at this time the defendant enters a plea of not guilty to Count I.

The Court: Enter a plea of not guilty to Count I.

Mr. Borland: Count II. (Reads the second count.)

Mr. Keleher: To which the defendant enters a plea of not guilty.

The Court: Enter a plea of not guilty, Mr. Clerk.

Mr. Borland: Count III only applied to Canfield.

The Court: All right. Is that all?

Mr. Borland: Count IV applies to this defendant, Your Honor.

The Court: All right.

Mr. Borland: County IV. (Reads the fourth count.)

6 Mr. Keleher: To which the defendant enters a plea of not guilty.

The Court: Enter a plea of not guilty as to that count.

Mr. Borland: That is all the counts.

The Court: The case will be set for trial on the 3rd day of November at 9:30 in the morning.

Is the defendant under bond?

Mr. Keleher: The defendant is under \$1,000 cash bond, and we respectfully move the Court the bond be continued.

The Court: It will be so ordered. That is all.

Filed March 2, 1953.

Verdict.

230 We, the Jury, duly empaneled and sworn in the above-styled cause, find the defendant guilty as charged in Count One of the indictment.

JEFF D. BYRD,
Foreman.

Filed Nov. 4, 1953.

Motion for Judgment Notwithstanding Verdict.

231 Comes now the defendant, Ben Saper, by his attorneys, Keleher & McLeod, T. B. Keleher, John B. Tittmann and J. C. Ryan, and moves the court to enter judgment notwithstanding the verdict in the above styled cause for the following reasons, to-wit:

1. The verdict of the jury was contrary to the law presented in the case and that the Government failed to prove its case beyond reasonable doubt.

2. Because the verdict of the jury was contrary to the evidence presented in the case and that the Government failed to prove its case beyond a reasonable doubt.

3. That the indictment upon which the defendant was tried, and the evidence upon which the defendant was convicted are not in harmony; that the evidence failed to show that the defendant knew or could have reasonably been expected to know that the aluminum in question is the property of the United States Government.

Wherefore, the defendant prays that the court enter
232 a judgment of acquittal in the above entitled case,
notwithstanding the verdict of the jury.

KELEHER & McLEOD, T. B. KELEHER
JOHN B. TITTMANN and J. C. RYAN
By T. B. KELEHER,
Attorneys for said Defendant.

Filed with proof of service Nov. 5, 1953.

Motion in Arrest of Judgment.

233 Comes now the defendant, Ben Sapir, by his attorneys, Keleher & McLeod, T. B. Keleher, John B. Tittmann and J. C. Ryan, and moves that the verdict of guilty returned against him by a jury in this court upon the 4th day of November, 1953, be arrested and no judgment and sentence be imposed thereon for the following reasons:

1. That during the course of the trial the witnesses of the Government developed evidence showing that the defendant did not know that the aluminum was the property of the United States Government.

2. That the evidence developed by the witnesses of the United States Government failed to show any overt acts on the part of this defendant to commit the offense charged in Count I.

Wherefore, this defendant prays that the verdict of the jury in this court be arrested and no judgment or sentence be imposed thereon.

KELEHER & McLEOD, T. B. KELEHER,
JOHN B. TITTMANN and J. C. RYAN
By T. B. KELEHER.

Filed with proof of service Nov. 5, 1953.

235 Transcript of Motion in Arrest of Judgment and
Motion for Judgment Notwithstanding Verdict in the

above entitled cause, before Honorable Carl A. Hatch, Judge, on December 14, 1954.

Appearances: For the Government: Melvin Robins, Esq., Assistant United States Attorney; For the Defendant: Keleher and McLeod, Esqs. By Mr. John Tittmann.

236 Mr. Robins: Case 17885 criminal. United States against Ben Sapis. Motion in arrest of judgment; motion for judgment notwithstanding verdict.

The Court: I will hear the motion.

(Argument by Mr. Tittmann.)

The Court: I don't want to limit your argument. This is motion day when our time is rather short. There is no question about the agreement being the gist of the conspiracy. There is no question in my mind but what the defendant had to intend to defraud the government of the United States. The only question I have had about this case, was there sufficient evidence to justify submitting it to the jury? I think I instructed the jury, if I recall, that they had to find that the agreement existed that it was the property of the United States, and he had to intend to defraud the United States.

Mr. Tittmann: You instructed on intent, but nowhere in your instructions do I find that you specifically require the jury to find that he knew he was dealing with United States government property.

The Court: I think he had to have knowledge that it was property of the United States, and he had to intend to defraud the United States. I will hear from the government as to what they think about their evidence.

(Argument by Mr. Robin.)

The Court: Mr. Tittmann, do you desire to reply?

Mr. Tittmann: Very briefly. Motion for judgment of acquittal should be granted.

237 The Court: You do insist on your motion in arrest?

Mr. Robin: No, your Honor.

The Court: The motion in arrest is withdrawn. Question arises in effect on the motion for acquittal, notwithstanding the verdict of the jury. In this case, gentlemen, I observed the evidence very carefully as it was introduced. I have given considerable thought to it since that time. I had understood that counsel had filed a motion for new trial, and my thought had been directed more as to whether a motion for new trial should be granted. But, as I understand, the motion for new trial has been withdrawn.

Mr. Robins: That is correct.

The Court: The only question is whether the Court should now, at this time, enter a judgment acquitting the defendant of the crime charged. As I construed the indictment, the essential provision was the unlawful agreement which is always present in a conspiracy case and it is the gist of the offense, that unlawful agreement was to defraud the government of the United States in the manner described, and as developed by the evidence. There is no question at all about the sufficiency of the pleas that these two men had an agreement. It was an unlawful agreement. The question in my mind is whether or not it was an agreement to defraud the government of the United States and whether the evidence was sufficient on that point.

The discussion this morning stresses the insufficiency of the evidence and relates largely to the testimony given by Mr. Sweet, which may in itself be sufficient to sustain the verdict of the jury in this case, but there are other circumstances in this case, aside from the testimony of Mr. Sweet, and nearly always intent is a matter that is proved by facts and circumstances surrounding the offense charged. This man had dealt with the School of Mines before. The property involved was of an unusual nature and characteristic which didn't ordinarily belong, or could have belonged to the School of Mines, such as they would commonly transact.

238 There are other circumstances in the case which definitely point, in my mind at least, the fact that

this defendant, the business in which he was engaged and his knowledge of his transaction with the School of Mines, he must have known, and I am sure in my own mind that he did know, I am certain of it, with regard that this aluminum did come from those airplanes, that it was, the United States government did have an interest in it, in some respect, and that he deliberately formed this conspiracy to defraud the government of the United States. It is a very vicious offense, in some respects; got another man involved, whose whole career has perhaps been ruined. I am resolving every doubt against the motion and construing doubts in favor of the government. I don't think it would be possible or proper at all to enter a verdict of acquittal on the evidence in this case from all the circumstances introduced, which so profoundly convinced me that the man was guilty of the offense charged in the indictment. If the evidence is insufficient at all, it will require some opinion from a higher Court than this for me to release or discharge this defendant on this motion. Is he present in the Courtroom?

239 Mr. Robins: No, he is not, Your Honor.

The Court: The motion is overruled. The defendant and the co-defendant Canfield will be here on the 11th day of January at 9:30 in the morning for sentence.

Order.

240 This cause came on to be heard on the motion of the defendant Ben Sapir for judgment notwithstanding the verdict in this cause, defendant's motion for a new trial and motion in arrest of judgment having been previously withdrawn, and upon consideration thereof the Court does find that said motion for judgment notwithstanding the verdict is not well taken and the same is hereby overruled.

Dated this 1st day of February, 1954.

CARL A. HATCH,

United States District Judge.

Filed Feb. 1, 1954.

Judgment and Commitment.

243 On this first day of February, 1954, came the attorney for the government and the defendant appeared in person and by counsel, John B. Tittmann, Esq., and Timothy B. Keleher, Esquire.

It Is Adjudged that the defendant has been convicted upon his plea of not guilty of the offense of conspiracy to commit offenses against the United States, with intent to defraud, in violation of Sec. 371, Title 18, USC, as charged in Count I of the indictment, and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of two (2) years.

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

CARL A. HATCH,
United States District Judge.

Filed Feb. 1, 1954.

Notice of Appeal.

244 Name and address of appellant: Ben Sapir, 3306 Linda Vista Drive, SE, Albuquerque, New Mexico.

Names and address of appellant's Attorneys: T. B. Keleher, A. H. McLeod, and John B. Tittmann, First National Bank Bldg., Albuquerque, New Mexico.

Offense: Conspiracy to defraud the United States.

Defendant was tried before a jury which returned a verdict of guilty upon Count No. I of the indictment, charg-

ing conspiracy to defraud the United States, and judgment of conviction was duly entered upon said verdict on February 1, 1954, and sentence of two years' imprisonment was imposed.

Appellant is not now confined, being at liberty on bail.

The above named appellant, by his attorneys, hereby appeals to the United States Court of Appeals for the Tenth Circuit, from the above stated judgment.

Dated: February 5, 1954.

T. B. KELEHER, A. H. McLEOD and
JOHN B. TITTMANN,
Attorneys for Appellant.

Filed Feb. 5, 1954.

[An approved appearance bond was filed February 6, 1954.]

[By orders of March 8 and May 6, 1954, the time for docketing the cause in the Court of Appeals was extended to May 15, 1954.]

Transcript of Testimony.

9 Be It Remembered that on the 3rd day of November, 1953, at the hour of 9:30 o'clock a.m., before the Honorable Carl A. Hatch, United States District Judge, in the United States District Court, United States Court House, Albuquerque, New Mexico, the following proceedings were had:

Appearances: For the Plaintiff: Paul F. Larrazolo, United States Attorney; Melvin L. Robins, Assistant United States Attorney. For the Defendant: A. H. McLeod, Timothy B. Keleher, John B. Tittmann, Attorneys at Law.

10 The Court: The first case set for trial this morning is Criminal Cause No. 17885, United States of America vs. Ben Sapi. What does the Government say?

Mr. Larrazolo: The Government is ready to go to trial. Your Honor.

The Court: What does the defendant say?

Mr. McLeod: The defendant is ready to go to trial with one reservation, that is, the people who were served with a subpoena duces tecum should have come to Court with certain data in their possession and we understand some of those records are not here and we, therefore, demand that they produce such records.

The Court: Of course, you may make that reservation, Mr. McLeod. The case will go ahead for trial, but I desire obedience of the subpoena or I will have to take appropriate action, otherwise. We can't let a witness disobey a subpoena and thereby dismiss them in this case. These witnesses who have refused to obey the subpoena of this Court, if they don't, at the earliest opportunity, have the records called for and you want them, you will suggest to the Court the proper proceeding.

Mr. McLeod: I would like to state to the Court, that in some instances we do not know whether they have brought the records or not.

The Court: Call the Jury. As your names are called, answer "present" and take seats in the Jury Box.

(The Jury was called by William D. Bryars, Clerk of the United States District Court.)

11 The Court: Members of the Jury: At this time,

I will make a brief statement as to the nature of the case on trial. I will not attempt to go into the details of the case or to explain the legal charges contained in the indictment; but rather, I will give it to you in the layman's language, generally, for your information, so that you may identify this case. The defendant, Ben Saper, has been jointly charged with a man named Canfield; the indictment charges these two men in the first count with having entered into a certain conspiracy by which Canfield, as Purchasing Agent for the School of Mines at Socorro, was in charge of certain Government property, which he had under contract sold for the Government to

the defendant Sapir at a certain price. This property was aluminum ingots and, under the contract, it would be loaded on railroad cars and was to be paid for by the pound. The weight was to be determined by weighing the cars and getting the proper weight that way. Later, in June of this year of this alleged conspiracy—what I say now is not a statement of fact, but merely what the indictment charges—these two men agreed that the defendant Sapir would take certain of this Government property which was not loaded on the Government cars and load it elsewhere on a truck of defendant Sapir and that Sapir would “take care” of the defendant Canfield; that, under this agreement, a truck load of these aluminum ingots were transported to Albuquerque and sold by the defendant Sapir and not accounted for to the Government and he paid Canfield the sum of \$200 out of the proceeds. That, generally, relates to the conspiracy charge in the first count of the indictment. The second count, which relates to the defendant Sapir alone, charges he did unlawfully embezzle funds received from this truck load of aluminum ingots, which lawfully belongs to the United States Government. The third and fourth counts charges the defendant Sapir with having offered a certain sum of money as a bribe to the man Canfield, a person acting for and on behalf of the United States Government, in violation of the law. Generally, that is what the case is about and about which you will hear evidence shortly.

I want to caution you at this time that the man Canfield, jointly charged in this indictment with the defendant Sapir, is not here on trial before you and that you will not speculate at all as to why he is not being tried or what has been the disposition of the case as to him. You will not consider that at all as you hear the testimony. You are only concerned in this case with the conspiracy, which will be more fully explained to you in the instructions. You are only concerned with the guilt or innocence of the particular defendant, Sapir.

13 (After which, the Jury was properly challenged by Court and Counsel.)

The Jury, being qualified, was duly impaneled and sworn by the Clerk of the United States District Court.

The Court: Call your witnesses.

Witnesses were duly sworn by the Clerk of the Court.

The Court: I wish to state to the witnesses that the rule has been demanded in this case, which means the witnesses have to stay out of the Courtroom during the taking of testimony. This also means you must not discuss the case with anyone, nor are you to discuss what you are going to testify to or what you may not testify to. You will not discuss this with any of the other witnesses or with anyone except the attorneys in the case—they may talk to the witnesses. The witnesses will remain outside where you may be called when you are wanted.

Members of the Jury, at this time we are taking a short recess to give counsel an opportunity to get their witnesses lined up and produce testimony. You have now been finally sworn in and I will give you an instruction at this time: you will be permitted to separate during periods of recess to go to meals and matters of that kind. During periods of separation, however, it is of greatest importance that

nothing that has happened in this Court room be
14 relayed by you to any person, that testimony heard

by you in this case will not be discussed with any person; do not talk about the case at all, nor permit any person to talk to you or in your presence about the case. Gentlemen, one instruction I always give is, that it is important that you wait before you speculate about any decision you are going to make until you have heard all the evidence in the case. Not only until then, but until you have heard argument of counsel in the case and instructions of the Court as to the law. All such matters are important and have a bearing and effect upon the decision you may ultimately make. Keep your minds free and open of any decision or speculation until the case is finally given to you to deliberate in view of all facts presented. I again caution you that you are not to speculate as to the guilt or innocence of the man Canfield, what has happened to him, or what may happen to him. You are only to try the defendant, Sapir, in this case.

Opening statements were made by Mr. Paul F. Larrazolo for the prosecution and Mr. A. H. McLeod for the defense.

LT. COMMANDER JOHN F. GILL testified as follows:

Direct Examination by Mr. Larrazolo.

15 Q. State your name, please, sir?—A. John F. Gill.

Q. What is your occupation?—A. I am on active duty with the United States Navy, as a Lt. Commander with the United States Naval Reserve.

Q. Commander, where are you stationed at present?—A. My official office is State College, New Mexico, but I am Development Contract Officer with the Navy, for the School of Mines at Socorro, New Mexico, that is, New Mexico Institute of Mining & Technology or State College.

Q. How long have you been in that official capacity in so far as the School of Mines at Socorro is concerned?—A. Since August 13, 1952.

Q. You have been in that capacity currently—all the time, until the present?—A. Yes, sir.

Q. Commander, I show you what has been marked Exhibit 1 for the Government and ask you to state what that is, please?—A. This is a copy of the contract, the current contract the Department of Navy has with the School of Mines, with the classified parts cut out of it.

Q. Is it a certified copy?—A. Yes, it is.

16 Q. Now, Commander, in connection with your duties as the Navy representative in Socorro, have you had occasion to do business with the School of Mines in Socorro, now known as the New Mexico Institute of Mining & Technology, in connection with this contract which you have just seen?—A. I have had administrative duties in connection with that contract with the School of Mines. I represent the Navy as administrator for this contract at Socorro.

Mr. McLeod: If the Court please, at this time we reserve the right to object to the introduction of this contract until we have had an opportunity to examine it during the noon hour.

The Court: You are offering it, are you, Mr. Larrazolo?

Mr. Larrazolo: At this time, we offer in evidence Exhibit 1 for the Government.

The Court: I want the record to show that in conference with counsel, I suggested this form of procedure myself, that is, the District Attorney would introduce at this time that part of the contract which is pertinent, the classified sections having been deleted, and, at this time it is admitted; subject, however, to the right of defense counsel during the noon hour to examine the contract fully, with

17 Commander Gill, including the classified parts. I forgot to instruct you, gentlemen, during our conference, that when examining a classified contract, or part of the contract, you, of course, are under your oath as attorneys. Classified information is most confidential and will not be revealed to any person. You may, though, after reading it, if there is any part of the classified part that you think is material to your defense in this case, you may tender such, and I will rule on the tender at that time. As to irrelevant material, I will not permit the introduction of it and I may require the Government to withdraw the exhibit. Upon that understanding, the exhibit is admitted into evidence. Now, Mr. Larrazolo, at this time if you want to read to the jury certain portions of it, you may do so, or you may wait until after defense counsel has examined it during the noon hour—whatever you desire.

Mr. Larrazolo: All right, sir. (Resuming direct examination.)

Q. Commander, you have the original of this contract in your possession, haven't you?—A. Yes, I have a signed copy in my brief case.

Q. That original contract is the same as this contract, except that this has certain classified portions deleted therefrom?—A. I believe this copy has no signature, also.

Q. But it is a certified copy?—A. Yes, that's right.

18 Q. Commander, have you examined the original contract which you have in your possession to see if any of the portions of it which have been deleted in this certified copy have anything to do with the property which you, as a representative of the Navy—

The Court: (Interrupting.) Don't answer that question. Counsel is about to object.

Mr. McLeod: That is calling for a conclusion of the witness—

Mr. Larrazolo: Your Honor, I have not finished the question—

The Court: Finish your question then. "How the classified section concerns this case," you were up to that point—what is the rest of your question?

Mr. Larrazolo: (Resuming.) As representative of the Navy, after examining that contract, the parts that have been deleted, do they have anything to do with the ownership of the Navy of this property?

The Court: (Motioning toward the witness.) Wait a minute—

Mr. McLeod: To which we object. That is calling for a conclusion or opinion of the witness and he is not qualified as an expert to answer such a question. The question as to where legal possession of the property remains, is not something for the Commander to answer.

The Court: Sustained.

Mr. Larrazolo: I would like to read this contract now, Your Honor.

The Court: You have the right to do so.

20 Mr. Tittmann: While Mr. Larrazolo is reading the contract, may we be furnished with the contract the Commander has?

The Court: (Addressing the witness.) You may let them be looking at it as the District Attorney reads it. (Witness furnishes defense counsel with contract taken from his brief case.) You may proceed, Mr. District Attorney.

Mr. Larrazolo: This contract, Plaintiff's Exhibit 1, which has been introduced into evidence, reads as follows—of course, you will realize, ladies and gentlemen of the jury,

that it has certain deleted parts which will not make sense in certain particulars—

The Court: I might better explain to the jury now this situation, so they will understand it. The only part of this contract thus far received in evidence is what is termed "declassified." Certain parts of the contract have been deleted. The reason for the deletions is that those portions of the contract which will not be read to you now concern military matters which are called classified—matters which should not be made public or read in court proceedings. That is the reason these deletions occur at this time. There may be later instructions on that, but you may understand why only part of the contract is introduced at this time, because the deleted parts are classified, confidential information. Proceed, Mr. Larrazolo.

[Plaintiff's Exhibit 1.]

United States of America, Department of the Navy.

Washington, D. C., 22 September, 1953.

19 I hereby certify that the annexed documents are copies of Contract NOrd-13348, as amended, with deletions made thereto, rendering such copies "declassified" as to military security information, the originals of which are on file in the Bureau of Ordnance.

M. F. SCHOEFFEL,
Rear Admiral, USN, Chief, Bureau of
Ordnance.
(Official Title.)

Office of the Secretary.

I hereby certify that Rear Admiral M. F. Schoeffel, USN, who signed the foregoing certificate, was at the time of signing, Chief, Bureau of Ordnance, and that full faith and credit should be given his certification as such.

In testimony whereof, I have hereunto set my hand and caused the Seal of the Navy Department to be affixed this

—day of September, One Thousand Nine Hundred and Fifty-three.

B. D. WOOD,

Acting Judge Advocate General of the Navy
for the Secretary of the Navy.

(Seal: Navy Department, United States of America.)

21 Department of Defense, Negotiated Contract, Department of the Navy, Contract No. NOrd-13348.

Issuing Office—Bureau of Ordnance, Washington 25, D. C.

Contractor—New Mexico School of Mines, Socorro, New Mexico.

Contract for—Research and Development in Connection With— (this part has been deleted and the amount is deleted).

Appropriation Chargeable—1731702.10—Ordnance and Facilities, Navy, 1953. (Expenditure Account 46000, Program Control 11000, Object Classification 079.)

Office to Payment Payment—U. S. Navy Regional Accounts Office, Eleventh Naval District, San Diego, California.

All public vouchers for payment under this contract should include a reference to NOrd-13348.

This negotiated contract is entered into pursuant to the provisions of Section 2(c) (1) of the Armed Services Procurement Act of 1947 (Public Law 413, 80th Congress), and any required determination and findings have been made.

This contract is entered into as of 1 October, 1952, by and between the United States of America, hereinafter called the Government, represented by the Contracting Officer executing this contract, and New Mexico School of Mines, (i) a corporation organized and existing under the laws of the State of New Mexico, hereinafter called the Contractor. The parties hereto agree that the Contractor shall furnish and deliver all the supplies and perform all the services set forth in the attached Schedule, for the consideration stated therein.

22 The parties hereto do further agree that this Contract, NOrd-13348, consists of the Title Page (Form DD 351), the Schedule (6 pages), the General Provisions (Clauses 1 through 24 on NAVEXOS Form 3302), the Additional General Provisions (Clauses 25 through 32 on NAVORD Form 2050), and a signature page.

Scope of Contract: Pursuant to the provisions of Clause 25, Scope of Contract, the following Task is hereby assigned:

Task 1: The Contractor agrees, for the period 1 October, 1952, through 30 September, 1953, to make available and employ its research and development facilities and personnel and to perform research and development in connection with (deleted) as outlined in the following Phases: (this part is deleted).

Payment of Fixed Fee: Not to exceed ninety percent (90%) of the fixed fee for each Task for any given period of this contract shall be paid in installments at the time of each provisional payment on account of Allowable Cost under each Task, the amount of each such installment thus payable to be equal to the proportion of said ninety percent (90%) that said related provisional payment bears to the total estimated cost of performance of the Task concerned during the period involved, as the same may be amended from time to time. Upon completion of the work or expiration of the contract period with respect to which any fixed fee is calculated and is payable, whichever event first occurs, that portion of the fee theretofore withheld in accordance with this paragraph shall be paid to the Contractor, provided (i) the Contractor shall have certified that it has used its best efforts to do all the work called for by the contract, and (ii) the Government, as represented by the Contracting Officer, certifies that the Contractor has performed satisfactorily the work called for. It is hereby understood and agreed that if either of the foregoing conditions is not met, or if circumstances (whether within or without the control of the Contractor) have arisen which have prevented the Contractor from performing the work in the manner and to the extent contemplated at the inception of the contract period involved, an equitable adjustment of the fee

shall be made within the limits of the amount of fee
23 so withheld. Failure of the parties to agree to such
adjustment of the fee shall constitute a dispute within
the meaning of the Clause of this contract entitled Dis-
putes.

Overhead: The Contractor shall be paid an amount to
cover all overhead, indirect charges, and other elements of
cost not specifically covered by subparagraphs (A) to (F),
both inclusive, of Clause 27, Allowable Cost, Fixed Fee and
Payment, equal to 27.2% of the direct salaries and wages,
including vacation and holiday allowances, for the period
1 October, 1952, through 31 December, 1952.

For the period of the contract subsequent to 31 De-
cember, 1952, it is understood and agreed that the fore-
going rate shall be subject to revision as may be agreed
upon. The Contractor may be reimbursed provisionally at
such rate until superseded by the new rate, which new
rate shall apply retroactively to and including 1 January,
1953.

Government-furnished Property: The Government will
furnish to the Contractor for its use in the performance of
work under this contract aircraft components and missiles,
both experimental and service, as required in specific pro-
grams on tests.

Revision to the General Provisions: Clause 3, Govern-
ment Property: Subparagraph (f)(i) is hereby superseded
by the following new subparagraph:

(f)(i) Except as otherwise specifically provided herein
the Contractor shall not be liable for any loss of or damage
results from willful misconduct or lack of good faith on the
part of any of the Contractor's directors or officers or other
representatives having supervision or direction of all or
substantially all of the Contractor's business or all of sub-
stantially all of the Contractor's operations at any one
plant, laboratory, or separate location in which this con-
tract is to be performed.

24 Mr. Larrazolo: The next item if this contract con-
sists of several printed pages, entitled "General Pro-

visions." Paragraph 3, Government Property, reads as follows:

Counsel then reads from the printed matter paragraph 3(a), (b), (c), (d), (e), (f)(i) and (ii). [Printed at page—.]

The Court: (Interrupting counsel as he reads paragraph (f)(ii).) Mr. Larrazolo, there is so much of that that does not apply to the case. I am afraid the jury will get confused about it.

Mr. Larrazolo: I appreciate that and I am sorry to have to do this, but in order to prove the Government's case—

The Court: All right, continue.

Mr. Tittmann: Where did you leave off?

Mr. Larrazolo: I don't know—

The Court: You may as well start over, I think you got down almost to "furnish to the Contracting Officer a statement of (a)"—

Mr. Larrazolo: (Resuming reading.) " * * * separate the damaged and undamaged Government Property * * *"

Counsel continues to read from the printed matter paragraph 3(f)(iii) and (iv), and 3(g), (h), (i), and (j). [Printed below.]

General Provisions.

(Cost Reimbursement Type Contract for Experimental or Developmental or Research Work.)

* * * * *

3. Government Property.

(a.) The Government shall deliver to the Contractor the property described in the Schedule or the specifications at the times stated therein, or if not so stated in sufficient time to enable the Contractor to perform this contract. If any of such property is not delivered to the Contractor by such time or times, the Contracting Officer, upon written request of the Contractor, shall equitably adjust the time of performance of this contract. In no event shall the Government be liable to the Contractor for damages or loss of profit by

reason of any delay in or failure to deliver any or all of the items set forth in the Schedule or specifications.

(b.) Title to all property furnished by the Government shall remain in the Government. Title to all property purchased by the Contractor, for the cost of which the Contractor is entitled to be reimbursed as a direct item of cost under this contract, shall pass to and vest in the Government upon delivery of such property by the vendor. Title to other property, the cost of which is reimbursable to the Contractor under this contract, shall pass to and vest in the Government upon (i) issuance for use of such property in the performance of this contract, or (ii) commencement of processing or use of such property in the performance of this contract, or (iii) reimbursement of the cost thereof by the Government, whichever first occurs. All the items to be furnished by the Government, as set forth in the Schedule or specifications, together with all property acquired by the Contractor title to which vests in the Government under this paragraph, are subject to the provisions of this clause and are hereinafter collectively referred to as Government Property.

(c.) Title to the Government Property shall not be affected by the incorporation or attachment thereof to any property not owned by the Government, nor shall such Government Property, or any part thereof, be or become a fixture or lose its identity as personality by reason of affixation to any realty. The Contractor shall maintain adequate property control records of the Government Property and shall identify the Government Property as such in accordance with the provisions of the "Manual for Control of Government Property in Possession of Contractors," dated March, 1951, which is incorporated herein by reference.

(d.) The Government Property provided or furnished pursuant to the terms of this contract shall, unless otherwise provided herein, be used only for the performance of this contract.

(e.) The Contractor shall maintain and administer, in accordance with sound industrial practice, a program for the maintenance, repair, protection, and preservation of Government Property, so as to assure its full availability.

and usefulness for the performance of this contract. The Contractor shall take all reasonable steps to comply with all appropriate directions or instructions which the Contracting Officer may prescribe as reasonably necessary for the protection of Government Property.

(f.) (i.) The Contractor shall not be liable for any loss of or damage to the Government Property, *e.* for expenses incidental to such loss or damage, except that the Contractor shall be responsible for any such loss or damage (including expenses incidental thereto) (A) which results from willful misconduct or lack of good faith on the part of any of the Contractor's directors or officers, or on the part of any of its managers, superintendents, or other equivalent representatives, who has supervision or direction of (I) all or substantially all of the Contractor's business, or (II) all or substantially all of the Contractor's operations at any one plant or separate location in which this contract is being performed, or (III) a separate and complete major industrial operation in connection with the performance of this contract; or (B) which results from a failure on the part of the Contractor, due to the willful misconduct or lack of good faith on the part of any of its directors, officers, or other representatives mentioned in subparagraph (A) above, to maintain and administer, in accordance with sound industrial practice, the program for maintenance, repair, protection, and preservation of Government Property as required by paragraph (e) hereof, or which results from a failure on the part of the Contractor to take all reasonable steps to comply with any appropriate written directions of the Contracting Officer under paragraph (e) hereof; or (C) for which the Contractor is otherwise responsible under the express terms of the clause or clauses, if any, specified in the Schedule; or (D) which results from a risk expressly required to be insured under this contract, but only to the extent of the insurance so required to be procured and maintained, or to the extent of insurance actually procured and maintained, whichever is greater; or (E) which results from a risk which is in fact covered by insurance or for which the Contractor is otherwise reimbursed, but only to the extent of such insurance or reimbursement; provided, that if more than one of the above exceptions shall be applicable in any case, the

Contractor's liability under any one exception shall not be limited by any other exception.

(ii.) The Contractor shall not be reimbursed for, and shall not include as an item of overhead, the cost of insurance, or any provision for a reserve, covering the risk of loss or damage to the Government Property, except to the extent that the Government may have required the Contractor to carry such insurance under any other provision of this contract.

(iii.) Upon the happening of loss or destruction of or damage to the Government Property, the Contractor shall notify the Contracting Officer thereof, and shall communicate with the Loss and Salvage Organization, if any, now or hereafter designated by the Contracting Officer, and with the assistance of the Loss and Salvage Organization so designated (unless the Contracting Officer has designated that no such organization be employed), shall take all reasonable steps to protect the Government Property from further damage, separate the damaged and undamaged Government Property, put all the Government Property in the best possible order, and furnish to the Contracting Officer a statement of (A) the lost, destroyed, and damaged Government Property, (B) the time and origin of the loss, destruction, or damage, (C) all known interests in commingled property of which the Government Property is a part, and (D) the insurance, if any, covering any part of or interest in such commingled property. The Contractor shall make repairs and renovations of the damaged Government Property or take such other action, as the Contracting Officer directs.

(iv.) In the event the Contractor is indemnified, reimbursed, or otherwise compensated for any loss or destruction of or damage to the Government Property, it shall use the proceeds to repair, renovate, or replace the Government Property involved, or shall credit such proceeds against the cost of the work covered by the contract, or shall otherwise reimburse the Government, as directed by the Contracting Officer. The Contractor shall do nothing to prejudice the Government's right to recover against third parties for any such loss, destruction, or damage and, upon the request of the Contracting Officer, shall, at the Government's ex-

pense, furnish to the Government all reasonable assistance and cooperation (including the prosecution of suit and the execution of instruments of assignment in favor of the Government) in obtaining recovery.

(g.) The Government shall at all reasonable times have access to the premises where any of the Government Property is located.

(h.) The Government Property shall remain in the possession of the Contractor for such period of time as is required for the performance of this contract unless the Contracting Officer determines that the interests of the Government require removal of such property. In such case the Contractor shall promptly take such action as the Contracting Officer may direct with respect to the removal and shipping of Government Property. In any such instance, the contract may be amended to accomplish an equitable adjustment in the terms and provisions thereof.

(i.) Upon the completion of this contract, or at such earlier date as may be fixed by the Contracting Officer, the Contractor shall submit to the Contracting Officer in a form acceptable to him, inventory schedules covering all items of the Government Property not consumed in the performance of this contract (including any resulting scrap), or not theretofore delivered to the Government, and shall deliver or make such other disposal of the Government Property as may be directed by the Contracting Officer. Recoverable scraps shall be reported in accordance with a procedure and in such form as the Contracting Officer may direct. The net proceeds of any such disposal approved by the Contracting Officer shall be credited to the cost of the work covered by the contract or shall be paid in such manner as the Contracting Officer may direct.

(j.) Unless otherwise provided herein, the Government shall not be under any duty or obligation to restore or rehabilitate, or to pay the costs of the restoration or rehabilitation of, the Contractor's plant or any portion thereof which is affected by the removal of any Government Property.

* * * * *

27 Mr. Larrazolo: (Preparing to read paragraphs 3(h) and (i) of Plaintiff's Exhibit 1 [which appears above].) The next two paragraphs are really the relevant paragraphs of the contract—

Mr. McLeod: Your Honor, we object—

The Court: I instruct the jury to disregard the comment the District Attorney has just made about the next two paragraphs of the contract being relevant. Counsel means there are parts of the contract he wants to call attention to. I might tell the jury that the greater part that has been read to you does not have a thing to do with this case, this is a criminal action. Proceed, Mr. Larrazolo.

Mr. Larrazolo: For the purpose of the record, I would like to state an apology to the jury for any comments made by me in reading this contract. I meant that for their information only. (Counsel concludes reading from the printed material by reading paragraphs 3(h), (i), and (j).) If the Court please, that is the part of the contract which the Government stated earlier to the Court and defense counsel that it wanted read to the jury.

The Court: Do you want anything more from this witness?

Mr. Larrazolo: (Resuming direct examination.) Commander, did I understand you to state a while ago that you are acting as Contracting Officer for the Navy?—A.

28 No. The Contracting Officer actually is the Captain in charge of the Contracts Division for the Bureau of Ordnance, who signs the contract.

Q. What is your capacity?—A. Representative of the Bureau of Ordnance and representative of the Contracting Officer.

Q. Let me see if I understand correctly—you are acting for the Contracting Officer in dealings between the Navy and the School of Mines?—A. Right.

Q. Is there anything the Contracting Officer is required to do on these contracts? This contract which has been introduced into evidence, do you perform everything on behalf of the Navy in that connection?—A. Not everything.

Q. Just what do you perform in your duties for the School of Mines, as representative of the Contracting Officer?—A. All of my duties are property administration and those duties are largely maintenance and control, taking inventory and keeping records on Government property which has been delivered to the Contractor.

Q. What is the name of the Contractor?—A. School of Mines.

Q. Now, are you or are you not, under the terms of the contract and under your duties as a Naval Officer,
29 required to approve the sale of any Government property which is temporarily held in custody by the School of Mines?—A. Yes.

Q. You are required to approve the sale, is that correct?—A. That's right.

Q. Have you in your performance of your duties at the School of Mines as representative of the Navy received any Government property that is to be left at the School of Mines, owned by the Navy?—A. All Government property shipped for use by the School of Mines, is shipped to me as Development Contract Officer there at the School.

Q. Is it consigned to you?—A. That's right. It is shipped from the Navy to the Navy.

Q. With reference to your program under this contract, which has been introduced in evidence and is between the Navy and the School of Mines, have any such deliveries been made to you for processing at the School of Mines?—A. I don't know if I understand your question.

Q. Have any deliveries been made to you at the School of Mines by the Navy for processing under this contract?—A. There are constant deliveries.

Q. Your answer is "yes"?—A. Yes.

Q. During the year 1952, since the beginning of
30 this contract, are you at liberty to state what deliveries have been shipped or made to you by the Navy for processing at the School of Mines, under this contract, since the date of the contract?—A. There are too many. I couldn't possibly name them.

Q. Are you at liberty to state what materials have been delivered to you for processing at the School of Mines, which later were smelted at the School of Mines?—A. Airplane components and missiles; such things as aircraft

wings, fuselages, tails, tanks, and aircraft parts. Aircraft which cannot be used are salvaged by being shipped to the Contractor where they are stripped and melted down.

Q. And after you received these items you have just testified to, what did you do with them?—A. The delivery was taken by the School of Mines. They have a fleet of Navy vehicles and take the deliveries. I never even see the equipment except on occasional inspections out in the area, but I don't have access to it, it is there for their research.

Q. Do I understand you to say the School of Mines has a fleet of Navy vehicles to transport this equipment?—A. That's right.

Q. The original vehicles were also Government property?—A. Yes, sir.

31 Q. Now, Commander, are you acquainted with the part of the airplanes that were smelted and reduced to the form of ingots, or something of that nature, at the School of Mines during the year 1953?

Mr. McLeod: We object to that as leading.

The Court: Overruled.

Mr. McLeod: Exception.

A. Yes, I have observed it, if that is the answer you want. I have observed them strip the property, break it up, and smelt it.

Q. Was that material from which they smelted Government owned property?

Mr. McLeod: We object to that as calling for a conclusion of the witness. That is for the jury to decide.

The Court: Overruled. (To the witness.) You may answer that.

A. Yes, that was Government property.

Q. Now, did you approve sales that were made by the Socorro School of Mines of scrap material left over there, after it had been smelted?—A. Yes, sir.

Q. Now, will you tell the jury and the Court just exactly what was done with the proceeds of the balance of this scrap and, first of all, also tell the Court whether this scrap that had been smelted or reduced to the form of ingots were Government property?

32 Mr. McLeod: Same objection.

The Court: Sustained.

Q. Will you state what procedure you go through for the sale of this scrap, so far as you are concerned as Contracting Officer.

Mr. McLeod: We object to that, unless he himself went through the steps.

The Court: He only wants to know the procedure. (To the witness.) You may explain the procedure.

A. The procedure used in the sale of scrap at the School of Mines is the ordinary procedure that the School of Mines used to sell any scrap. As Contractor, it is authorized to sell Government property and that sale is approved by the Naval Officer in charge at the School. Now, they are not required to—

Mr. McLeod: We object to his conclusions.

The Court: He is merely explaining the general procedure. Overruled.

A. (Continuing.) In fact, they use the procedure employed by the School in regular sales of all property and it is acceptable to the Navy, as long as they are approved by the Naval Officer who has an office there and is consigned on that contract.

Q. Under the procedure you followed at the School of Mines—in your present procedure in dealing with the
33 School of Mines, after a sale is made, what happens to the money the School of Mines receives from the sale?

Mr. McLeod: If the Court please, he wouldn't be able to answer that.

The Court: Overruled. Let him answer if he knows.

A. That money is received by the Contractor.

Q. Who is the Contractor?—A. The School of Mines, and on the next monthly voucher the charges are listed and they are reimbursed from the Government; if the contract is approved, the next month the voucher would be entered

as a credit. That information is sent by me to the Naval Material Inspector in Texas.

Q. That is done under the provisions of the contract I just read to the jury?—A. Right.

Q. That property we were just speaking about that is sold by the School of Mines, is it or is it not Government property?

Mr. McLeod: If the Court please, we object.

The Court: Sustained.

Q. Did you approve a bid submitted by the United Iron and Metal Company for the purchase of scrap aluminum and brass on May 19, 1953?—A. I am not sure of the date, but—

Q. I show you here what has been marked Plaintiff's Exhibit 2 and ask you to state what that is, please,
34 sir.—A. That is an Invitation for Bid for aluminum, resmelted, in ingot form, approximately 100,000 pounds, submitted by United Iron & Metal Company, signed by Ben Saper, accepted by H. R. Canfield, Purchasing Agent for the School of Mines, and I approved it.

Q. Why did you approve it?—A. This was high bid for the sale of this particular material. It was the highest of the bids received for this aluminum.

Q. Why did you have to approve that sale?—A. I have specific instructions—I approve the sale, if the School performs the operation.

Q. Would you have to accept that bid if it were not Government property?

Mr. McLeod: Objection.

The Court: Sustained.

Mr. Larrazolo: I offer this, Plaintiff's Exhibit 2, in evidence at this time.

The Court: Any objections?

Mr. McLeod: No objections.

The Court: It is admitted.

Q. Commander Gill, did you ever see the property which was sold by the School of Mines to the—I withdraw that

question. Did you ever see the property on which the high bid of Mr. Sapir of the United Iron & Metal Company was accepted by the School of Mines? Did you ever see that particular property?—A. Yes, sir.

Q. That property was smelted by the School of Mines from these aircraft components?—A. Yes, sir.

Q. Was that property covered by that contract between the School of Mines and the United States Navy?—A. Yes, sir.

Q. Now, Commander Gill, do you have any letters in your possession written by you and a reply to your letter from the Chief, Bureau of Ordnance, Navy Department, in connection with this contract?—A. Yes, sir.

Q. Let me have them please. (Witness takes papers from his brief case and hands them to counsel.) I show you what has been marked for identification Plaintiff's Exhibit 3 and ask you to state what that is, please?—A. That is a letter dated the 10th day of April, 1953 written by myself to the Chief of the Bureau of Ordnance.

Q. And the date again, please?—A. 10th of April, 1953.

Q. I now hand you what has been marked Government's Exhibit 4 and ask you to state what that is?—A. Letter dated the 27th of April, 1953, from the Chief, Bureau of Ordnance, in reply to this letter which I wrote on April 10, 1953.

36 Mr. McLeod: If the Court please, we would like to examine those letters before they are introduced.

(Mr. Larrazolo hands Exhibits 3 and 4 to counsel.)

The Court: Can you be asking another question, Mr. Larrazolo, while they examine the letters?

Q. What was the purpose of your writing these letters?

Mr. McLeod: We object.

The Court: You had better wait and see whether that objection is warranted.

Q. Commander, was the School of Mines during the existence of this contract and on April—June 12, 1953, acting as an agent of the United States Government in the sale of this aluminum to Ben Sapir and his company?

Mr. McLeod: That calls for a conclusion of the witness, Your Honor.

The Court: Have you offered these letters?

Mr. Larrazolo: I have not yet, Your Honor. I wanted to finish asking questions—

The Court: Agency is a matter of law. I will sustain the objection at this time.

Mr. Larrazolo: We would like to offer Government's Exhibits 3 and 4 in evidence at this time and read them to the jury.

The Court: Does counsel have any objections?

37 Mr. McLeod: Yes, we object to these on the grounds that they are not pertinent. This is but some correspondence which may have been carried on between two offices of the U. S. Navy, but it is immaterial and has nothing whatsoever to do with the case before the Court.

The Court: What is the purpose of these letters, Mr. Larrazolo?

Mr. Larrazolo: They clarify certain questions raised by Commander Gill's interpretation of the contract under which the Navy and the School of Mines are operating.

The Court: Were they brought to the attention of the defendant in any way?

Mr. Larrazolo: They never had occasion to bring them to his attention.

The Court: If it is merely an interpretation of the contract and these letters were never brought to the attention of the defendant in some way or if he has no knowledge of them, it is not admissible.

Mr. Larrazolo: We are trying to show what the contract means and these are for the purpose of clarification.

The Court: The objection will be sustained. We will not admit them.

Mr. Larrazolo: That is all.

The Court: Does the defense wish to cross-examine?

Mr. McLeod: If the Court please, we would like to reserve the right to question this witness after examination of the contract.

* * * * *

38 The Court: Return Commander Gill to the stand. Defense counsel wish to cross-examine. You may proceed with the cross-examination.

Mr. Tittmann: Before cross-examining the witness, the defense would like to now make its reserved objection to Plaintiff's Exhibit 1, the contract, on the grounds that it is not a complete document, but has portions deleted therefrom, and, on the further ground that the defense cannot tell whether or not the deleted portions may, as the evidence in this case is introduced, become material.

The Court: Overruled. The Court has heretofore conferred with counsel in order that they might understand that portions are deleted and it was admitted, subject to that. Objection overruled.

39 Mr. Larrazolo: If the Court please, we would like to have the record show that defense counsel, as well as the defendant, have read the entire contract in its entirety.

The Court: I don't know whether they have read it or not. The record should show that they had the opportunity to read it. Also, the record should show, the Court advised counsel for the defense that if any part or portion of the contract had been omitted which was relevant, having a material bearing on the case, they were to call it to the attention of the Court and offer it in evidence and it would be either admitted or that part withdrawn. Proceed Mr. Tittmann.

Cross-Examination by Mr. Tittmann.

Q. Commander, when did you take your assignment as Contracting Officer at the New Mexico School of Mines?—A. On August 13, 1952.

Q. Am I correct, your proper designation is Contracting Officer?—A. Development Contract Officer.

Q. Then the Contracting Officer referred to in the contract is your superior, is that correct?—A. Correct.

Q. I would like to call your attention to Plaintiff's Exhibit 2. That is the original bid which you testified
40 was submitted for the purchase by this defendant of this lot of aluminum, is that correct?—A. That's right.

Q. Do you recall when you first saw that, Commander?—
A. No, I don't.

Q. When you first saw it, was it signed by the defendant, Ben Sapir?—A. Yes.

Q. Now, with reference to the endorsement that appears on that, "Approved, s/ J. F. Gill, May 19, 1953, Development Contract Officer, USN, State College, New Mexico," did you put that on there?—A. Yes, sir.

Q. After it had been submitted to you and was already signed by Ben Sapir, the defendant?—A. Right, sir.

Q. You can't state that he ever saw that Naval endorsement on that piece of paper, can you?—A. I don't know whether he did or not.

Q. Did you ever meet this defendant before?—A. At noon today, for the first time, I met Mr. Sapir.

Q. You never discussed with him any of the Naval procedures or matters to which you have testified this morning, is that correct?—A. Right.

Q. I ask you to look at Plaintiff's Exhibit 2 again,
41 Commander, and state to the Court and jury whether or not that is a regular Naval form of bid submitted?—A. No, it is not.

Q. Can you find any place on that document, except your signature, where it refers to Navy property in any way?—
A. (Witness studies Exhibit 2.) Not specifically, but the part concerning radiators does say, "removed from aircraft," which would imply it, I assume.

Q. Well, now, what are you going to imply, Commander? It does not state Naval aircraft, does it?—A. No, it does not.

Q. It does not say anything about Government property, does it?—A. No, sir.

Q. As a matter of fact, this is the usual form of Invitation the School of Mines uses to buy property, isn't it?—A. Well, I believe they use it for buying and selling both.

Q. To the seller, the word "furnish" is struck out, isn't it?—A. That's right, and they put in its place "purchase."

Q. They are using this form now to sell, but is their regular form to buy, isn't that correct?—A. I believe it is that way.

Q. Do you know, Commander, whether this particular lot of scrap was advertised?—A. I don't know, but I assume it was.

42 Q. You have no personal knowledge of it?—A. No, I don't.

Q. Isn't it true, Commander, that the Navy has very specific regulations governing the disposal of Naval property?—A. They have considerable regulations.

Mr. Tittmann: Your Honor, I would like the jury to have the privilege of looking over this bid which we have been discussing.

The Court: All right. Gentlemen, I wish that both sides would speed up a little and move along a little faster. We have a lot of cases to try at this term of Court. I am not being critical, but there is lots of work to be done this term and we have to move on a little faster.

Mr. Tittmann: (Resuming cross examination.) Commander Gill, I would like to show you a pamphlet, Defendant's Exhibit A, entitled "Naval Property Distribution and Disposal," Regulation 1, covering Government owned property under provisions, revised October 1, 1951, and consisting of some 113 pages with forms, and ask you to state to the Court and the jury whether that regulation was in effect at the time of the bid represented by Government's Exhibit 2?—A. Yes, sir.

Q. Are you familiar with this pamphlet covering disposal of Naval property?—A. To a certain extent.

43 Q. Can you state as a fact whether it requires publication of a bid and a bid form definitely defining the property as Government property?—A. I believe that it does.

Q. Now, directing your attention to page 92, relating to Standard Forms 114 and 114A, "Sale of Government Property—Invitation, Bid, and Acceptance," those are the forms, are they not, that regulations require be used in the disposal of Naval property?—A. Ordinarily, yes.

Q. Now, calling your attention specifically to paragraph

2, on page 93, entitled "Condition of Property," and says, "All property listed herein, referred for sale, as is and where is, without recourse against the Government." Is that the general practice of the Navy in disposing of property?—A. Yes, sir.

Q. Calling your attention, Commander, to page 95 of this pamphlet, paragraph 12, which reads, "Verbal Modification—Any oral statement made by any representative of the Government modifying or changing the conditions of this contract is in violation of this contract and such modification is improperly given to the purchaser." Is that a regular procedure requirement in the Navy for disposal of property?—A. Ordinarily, yes.

The Court: (Interrupting.) Mr. Tittmann, this witness was asked about procedure in the disposal of property on direct examination, which would ordinarily give you the right to cross-examine on that subject. I assume that perhaps you may be getting to the possibility that the alleged sale in this case did not conform with regulations which you have introduced and have had the witness certify to—

Mr. Tittmann: (Interrupting) That would be my next question.

The Court: Then let's just ask him—that's what I mean—let's get on with this.

Mr. Tittmann: (Resuming.) If I may adopt the Court's questions, I will ask the witness to answer: Were the Naval Regulations in this book, to which you have just certified, complied with in making this sale?—A. No, there weren't any regulations—

Q. Were they followed?—A. No.

Mr. Tittmann: That's all, Your Honor.

The Court: Is there any re-direct?

Re-Direct Examination by Mr. Larrazolo.

45 Q. Why weren't those Naval Regulations followed in this case, Commander?—A. In the case of educational institutions, the Navy allows them to use their own procedures, so long as they are adequate.

Q. Is that definitely allowed in this particular case of the School of Mines?—A. Yes, sir.

Q. Then all those regulations that Mr. Tittmann quoted to you did not apply to this case, is that correct?—A. That is my belief, yes.

Q. You, as representative of the Navy, made the determination that they did not apply and went ahead and made the sale in accordance with the way it was actually made, is that correct?—A. That's right.

Q. The sale Mr. Tittmann is talking about in asking those questions about Navy Regulations, was made on the bid of Mr. Sapir as a result of the advertisement of the School of Mines and involved Navy property, Government property, is that correct?—A. That's right.

Mr. Tittmann: May I ask one more question?

The Court: I don't usually permit re-cross examination.

46 Mr. Tittmann: I would just like to ask this—Commander, the sale was authorized, was it not?—A. That's right. May I bring the letters out that I produced this morning?

Q. If necessary.—A. (Handing letters to counsel.) That is my authorization from the Bureau of Ordnance.

Q. Is that the only authorization you have in writing?—A. The only authorization in writing in regard to the sale of this aluminum, which is a scrap sale.

Mr. Larrazolo: If the Court please, we would like to produce those letters and introduce them in evidence.

The Court: I will have to permit the Government further re-direct, now.

Mr. Larrazolo: (Addressing the witness.) Have you got any written directives from the Navy Department authorizing the procedure just testified to in the case of an educational institution, other than these letters?—A. Yes. I can show you. (Witness leaves the stand and goes to his brief case, removes some printed matter.) Read this paragraph here.

Mr. Larrazolo: Commander Gill, please take the stand and read that to the jury.

The Court: Hereafter, gentlemen, there will be no re-cross examination.

47 Mr. Tittmann: (Examining the printed matter produced by witness.) If it please the Court, may I ask a question concerning identification here? (Turning to witness.) Who is the Contract Administrator, Commander?—A. I perform the duties of Contract Administrator, supervising inspections. In Houston, Texas, is the Contract Administrator for all Navy contracts in his area of five states.

Q. Who is Property Administrator?—A. I have been designated Property Administrator.

The Court: Kindly read the paragraph referred to.

The Witness: (Reading.) This taken from Appendix B, Armed Services Procurement Regulations, Manual for Control of Government Property in Possession of Contractors. Paragraph 403.3 reads as follows:

“Approval of Scrap Procedure by the Contract Administrator. The Property Administrator shall review the Contractor’s procedures relating to the physical control of scrap and records relating thereto and he shall report his findings to the Contract Administrator. If the Contract Administrator determines that the Contractor’s scrap procedures and records are adequate to protect the Government’s interest, he shall approve same in writing and furnish the Contractor and Property Administrator a copy of his approval. If the Contract Administrator determines that corrective measures are necessary to protect the Government’s interests, he shall so advise the Contractor and the Property Administrator and the Contractor shall accomplish such corrective measures prior to approval by the Contract Administrator. The Property Administrator will from time to time assure, by actual inspection and selective checks, that the approved procedures are effectively carried out. Where the

Property Administrator considers the approved procedures for the control of scrap to be inadequate for any reason, he will report the facts in writing to the Contract Administrator. The Contract Administrator will consider each such report and issue appropriate written instructions to both the Contractor and the Property Administrator.”

48

Mr. Tittmann: Was that complied with in this case?—A. I issued no written instructions. I assumed my predecessor had done so.

Mr. Tittmann: I ask to have this particular document retained by the Court for the purpose of this trial.

The Court: I assume this paragraph has been offered and read in evidence. There may be something classified in that file. The Commander will be in attendance here and it can be made available.

Mr. Tittmann: That's all, Your Honor.

The Court: Is there any re-redirect, gentlemen?

Mr. Larrazolo: All I want to do is have the witness read the letters which were requested of him by counsel for defense and have them introduced into evidence.

The Court: They have to do with the questions asked by Mr. Tittmann?

Mr. Larrazolo: They have to do with the authority to sell this particular scrap and the witness has answered questions of defense counsel in regard to them and in the light of that—

The Court: Are you re-offering these letters into evidence at this time, Mr. Larrazolo?

49 Mr. Larrazolo: Yes, sir.

The Court: Any objections, Mr. Tittmann?

Mr. Tittmann: We object on the same grounds.

The Court: Objections overruled. You may read them.

(The witness then reads to the Court and the jury Plaintiff's Exhibit 3 and Plaintiff's Exhibit 4, printed at pages 136 and 137.)

The Court: Members of the jury, in connection with these letters which have just been read in your presence, I want to instruct you as follows: Those letters are both dated prior to the occurrence of any of the acts alleged in the indictment of this case. They are not in evidence to defend in any sense at all any of the particular charges made against

the defendant, nor are they evidence of guilt on his part. They are only admitted to you in connection with the cross-examination of this witness by defense counsel, when asked about his written authority to proceed in the manner he did. This is the only way in which these letters are to be considered by you in this case. (Addressing counsel.) Is there anything further, gentlemen?

Mr. Tittmann: Could I enter an objection to that portion of the first letter which refers solely to hearsay statements?

50 The Court: The jury will not consider any hearsay statement contained in the letter and will consider nothing whatever in the letters which might reflect upon the guilt or innocence of the defendant as charged in the indictment. (Addressing counsel.) Call your next witness.

Mr. Larrazolo: Can Commander Gill be excused?

The Court: I doubt if it is advisable.

HAROLD RICHARD CANFIELD testified as follows:

Direct Examination by Mr. Larrazolo.

51 Q. Will you state your full name, please, sir?—A. Harold Richard Canfield.

Q. Mr. Canfield, up through the month of June, 1953, where were you employed?—A. New Mexico Institute of Mining & Technology at Socorro, New Mexico.

Q. How long did you work there?—A. I worked for the New Mexico Institute of Mining and Technology for a period of six years—four years in Socorro and two years here in Albuquerque.

Q. What was your position with the New Mexico Institute of Mining & Technology at Socorro, also known as the School of Mines, during the year 1953?—A. I was Purchasing Agent, sir.

The Court: I think, gentlemen, for the benefit of all concerned, it is understood when questions are asked by counsel referring to the School of Mines, we and the jury all understand that reference is being made to what is at present called New Mexico Institute of Mining and Technology at

52 Socorro, New Mexico. If counsel will all agree to that, then the members of the jury may know when we say School of Mines what we are talking about.

Mr. Larrazolo: (Resuming.) What was the nature of your duties at the School of Mines, Mr. Canfield?—A. I purchased all items that the School used in the smelting end of it and in our research work, and the Bureau of Mines and Minerals research. I purchased all items that the School proper used. I also handled the sale of excess items that we had offered for sale, that is, the School itself.

Q. In connection with your duties as Purchasing Agent at the School of Mines, did you have occasion to handle the sale of smelted scrap of Navy property?

Mr. McLeod: We object to that.

The Court: Leave out the reference to Navy property. Did you have anything to do with the sale of scraps?—A. Yes, sir.

Mr. Larrazolo: Did you have anything to do with the sale of scrap from smelted airplane parts?—A. Yes, sir, on this occasion I did.

Q. That is, you had something to do with that kind of scrap during the year 1953, didn't you?—A. Yes, sir.

Q. Referring your attention to the scrap which was smelted from the Navy airplanes—

53 Mr. McLeod: If the Court please, we object to Naval airplanes.

Mr. Larrazolo: I withdraw the question. Mr. Canfield, referring your attention to the sale of scrap to the defendant, Ben Sapis, in which you, if you had any occasion to deal with Ben Sapis, sold some aluminum ingots; whose property was that aluminum? To whom did it belong?

Mr. McLeod: We object.

The Court: Overruled.

A. In my mind it belonged to the Government.

Mr. McLeod: We move that answer be stricken. It is a conclusion of the witness.

The Court: Overruled.

Mr. McLeod: Exception.

The Court: That answer, Mr. Larrazolo, was intended to let us know whose property this was?

Mr. Larrazolo: Yes, sir.

The Court: Whose was it?

The Witness: Government property.

Mr. McLeod: I object to the Court's question.

The Court: Overruled.

Mr. Larrazolo: (Resuming.) Mr. Canfield, do you happen to know whether or not the School of Mines offered certain aluminum scrap for sale for public bids on or about the 19th of May, 1953?—A. Yes, sir.

Q. Do you happen to know who was high bidder on that sale?—A. Yes, sir.

Q. Who was it?—A. United Iron and Metal Company.

Q. Now, who was the person who dealt with the School of Mines for the United Iron and Metal Company?—A. Mr. Ben Sapis.

Q. Is he present here today?—A. Yes, sir.

Q. Point him out.—A. Over at the table there (witness points to counsel table) is where he is sitting.

Q. Mr. Ben Sapis, stand up, please. Is that the one?—A. Yes, sir.

Q. Mr. Canfield, when was the first time you talked to Mr. Sapis, if you happened to talk to him, before the 19th of May, 1953?—A. He was successful in bidding for a previous sale of scrap, or rather the United Iron & Metal Company was successful on a previous bid, and we talked together on that occasion of awarding that scrap.

Q. On the occasion of the purchase of this scrap on May 19, 1953, just when did you see him after that concerning the purchase of this aluminum scrap? Approximately the day, if you don't remember exactly.—A. In making arrangements for the removal of this scrap from the School of Mines, he called several days before he

picked this up, then he came down on the morning they picked it up.

Q. What day did they come to pick it up?—A. June 12th, sir.

Q. What year?—A. 1953, sir.

Q. What arrangements did you make with him as to the method of obtaining the weight of that aluminum scrap?—A. I had talked to my superior, Mr. Fred Sweet, and told him that the—

The Court: You were asked what arrangements you made with the defendant himself.

A. When he called several days prior to the time he came down there, I informed him we would use the railroad weights.

Mr. Larrazolo: Exactly what do you mean by railroad weights?—A. The car would be weighed by the railroad company, sir.

Q. Did he agree to that method of weighing them?—A. Yes, sir.

Q. Now, do you know what the exact weight of that aluminum was before it was weighed?—A. Certainly not, sir.

Q. Is that the reason you arranged to have the railroad weigh it?—A. Yes, sir.

56 Q. Now, those railroad weights you were talking about, do I understand they were to be made by the railroad, and what arrangements did you have with reference to getting notification as to the actual weight of the material they were to load on the car?—A. I contacted Mr. Sam Zimmerly by telephone from my office, he is the local Santa Fe agent—

Q. Just a minute, what arrangements did you have with Mr. Sapir as to getting the actual weight made by the railroad?—A. I told him we would use the railroad weights when he called and he agreed with that. I told him the railroad would submit the weight to us and payment would be on that basis.

Q. Now, referring your attention to June 12, 1953, starting from the beginning, what happened on that day?—A. Mr. Sapir called me the day before and told me his truck

would be down to pick up this aluminum and haul it to the depot. He also informed me that since his truck would be down to haul the aluminum to the depot, would I be kind enough to hire three or four men to help load— for which I made arrangements and the morning of the 12th of June the men were waiting there by the Administration Building of the School of Mines. That morning he phoned and told me to hold the men that I hired for him to use and

Mr. Sapir came to my office at about eight or nine
57 o'clock that morning and we immediately proceeded to handle this shipment which was scheduled. At first

we had to locate his truck. We set out to look for the truck and took the men with us and went to the area in back of the School. We got in my automobile and rode up there and found his truck already there with his men loading and these men that I had hired were told to go to work and load this aluminum. The aluminum was loaded on the truck and we followed the truck to the depot, with all the men on the truck.

Q. Mr. Canfield, you have testified the truck went over there to pick up a load of aluminum, is that correct?—A. Yes.

Q. I hand you this photograph which has been marked Plaintiff's Exhibit 5 and ask you to state if the aluminum you are talking about resembled the material on that picture?—A. Yes, sir.

The Court: If the aluminum you are talking about resembles the aluminum in that picture, would you say that is the same aluminum?—A. Well, this is our area and I assume the picture was taken in our area, but I don't know when that picture was taken.

Mr. Larrazolo: Go ahead with your story.

A. (Continuing.) We followed this load of aluminum to the depot, the aluminum was unloaded into the railroad car, and the truck and men returned to the school, and they started the same procedure again.

58 Q. The aluminum was unloaded from the truck onto what car?—A. The railroad car at the depot. Then we returned to the School of Mines and proceeded to load the truck again. I believe on this trip I parked my own car and used a pick-up belonging to the School of

Mines and used that to follow the truck the balance of the day. The second load of aluminum was loaded on the truck and we again started for the depot. We accompanied the truck to the depot and witnessed the aluminum being loaded onto the railroad car again.

Q. That was the second load?—A. The second load. We then started back and stopped for lunch in town. The men were told to be back at one o'clock and Mr. Sapir and I had our lunch and came back to the School and about ten minutes after one the men had all assembled and we started the same procedure again. To the School where the aluminum was loaded on the truck and then started back to the depot again, and we were following again in the pick-up. And it was during one of these trips—I don't remember which one—in the morning, I believe—was when I was approached and I agreed to give Mr. Sapir a little extra weight. I don't remember whether it was in the morning or afternoon.

Q. Now, referring to that particular occasion, just
59 exactly what was said by him and you—by you to him and by him to you?—A. Well, during one of the trips, Mr. Sapir said that he paid a lot of money for the aluminum and he would like to get a little extra aluminum. I dwelled on it awhile and thought about it and he said he would take care of me—

Q. Did he use those words, or otherwise?—A. I think it was, "I will take care of you."

Q. You are sure that's what he said?

The Court: He has answered the question. There is no use repeating.

A. (Continuing.) And I agreed to let him have this additional weight and, at first, I am not sure whether we said we would put all the aluminum in the car or take some back in the truck, but he, Mr. Sapir finally decided to take it back to Albuquerque on the truck, which I agreed to let him do, and the loading went on for, I believe, a total of four trips made there to the depot. The last trip was when I turned in the State vehicle and went with Mr. Sapir in his car to the depot. We arrived at approximately the same time as the truck.

Q. What time did you arrive at the depot the
60 last time you went down there?—A. I don't remem-
ber exactly when it was—

Q. Could you tell at approximately what time it was
when you arrived at the depot with the third load—with
the last load you loaded into the railroad car?—A. I
would say four about—three-thirty to four p.m.

Q. All right, go ahead.—A. As I said, we arrived at
approximately the same time with the truck—

Q. That was what load?—A. With the fourth load, and
Mr. Sapir paid the men off that I had hired for him, and
they stopped on the fourth load and were taken back up
to the School in a personal car of one of the men.

Q. What time of day was that?—A. My office was
already closed, so it was after five o'clock—after quitting
time—between five and six o'clock. As I say, the men
were picked up in a worker's car that drove to the depot.
Mr. Sapir dismissed the men, paid them for their work,
and they all got into one man's car and drove away. Prior
to their going, the men put a sideboard on the truck, that
was laying on the ground. They put a sideboard on it and
then they were dismissed and went. Then Mr. Sapir and I
accompanied the truck to the Service Station, where the
truck was gassed up.

Q. Just a minute, Mr. Canfield, you say he dis-
61 missed the men who were working on the truck, is
that correct?—A. Yes, sir.

Q. The ones you hired?—A. Yes, sir.

Q. Did he give any reason for dismissing them at that
time?—A. Well, it was late and getting dark, you know—

Q. Did he give that reason?—A. Well, the men were
working late, one man had injured himself, they had been
on the job since about eight o'clock that morning and it
was then about six o'clock—

Q. My question was: Did he give any reason for dis-
missing those men at that time?—A. I wasn't standing
close to him, but I think he told the men they had put in
a good day of hard work and were tired and it was time
to go home.

Q. All right, proceed.

The Court: You say you gassed up the truck. Then
what happened?

A. The truck left in a northerly direction on Highway 85. Mr. Sapir and I got in his car and went back through town. I showed him where Miss Maggie Hollis, an employee of mine who had asked for a ride to Albuquerque, lived and we picked up Miss Hollis. Then Mr. Sapir drove me to my home and I got out. They left me there.

Q. Did you notice in what direction the truck
62 went?—A. The truck was in the Service Station and went out in a northerly direction on Highway 85, after the truck was gassed up. I know he told them to go ahead and they started out north.

Q. Do you know whether or not that aluminum was ever put into the railroad car—that fourth truck load?—A. No, sir, not in my presence, while I was there.

The Court: What did you say?—A. No, sir, not in my presence.

Q. Did the defendant, Ben Sapir, tell you where he was taking that aluminum in the truck?

Mr. McLeod: If the Court please, that is very leading.

The Court: It is leading. (To the witness.) What did he say about where the aluminum was going, if anything?—A. He just dismissed the truck and said, "Go ahead. See you later." That's all I can recall.

Mr. Larrazolo: (Resuming.) Mr. Canfield, during the time you were seeing that this aluminum was taken from the grounds of the School of Mines, for whom were you acting as agent at the time?

Mr. McLeod: We object.

The Court: Sustained. That is a matter of conclusion; his own conclusion as to whether he was acting as agent.

63 Mr. Larrazolo: Whose property were you handling at this time?

Mr. McLeod: If the Court please, we object.

The Court: He has answered that question before. That is repetitious.

Mr. Larrazolo: (Resuming.) Mr. Canfield, what, if anything, happened with reference to what you have testified

on the following day, June 13, 1953?—A. The following day was Saturday, sir. We had been entertaining a boy at our home for a week and we had promised his parents we would return him on Saturday. My family and this boy all got in my car and we drove to Albuquerque. In taking the boy home, we were going North on First Street, when we got to Lomas Boulevard Mr. Sapir came around the corner in his car. We tooted at each other. I told my wife, "I have to see this man." I got out of the car and told my wife to pick me up in the vicinity of—

Q. (Interrupting.) Just a minute, this man waved at you?—A. We tooted at each other, sir, and acknowledged each other and I stopped and he stopped.

Q. Who is "he"?—A. Mr. Sapir, sir.

Q. The defendant, Ben Sapir?—A. Yes, sir.

Q. He was riding in his automobile?—A. Yes.

Q. What kind of automobile?—A. Blue, Cadillac.

64 Q. All right.—A. I told my wife to pick me up in the vicinity of the Hilton Hotel. I got out of my car and got in the car with Mr. Sapir. We drove on North First Street in a southerly direction, down Central. I don't remember the exact route we took, but we went up East Coal and turned off on Wellesley Street and went up to a house there somewhere in the vicinity of Wellesley Street. He stopped and got out of the car and went into the house. He was gone several minutes and came out and got back in the car. As we drove off, he said, "This is for you." And I held out my hand and he put some bills in there. I didn't count these bills, I just put them in my pocket.

Q. What do you mean by bills?—A. Currency, sir.

Q. All right.—A. Mr. Sapir, then asked me if I had any place to go, and I said, "Yes, back to meet my wife." And he took me to the vicinity of the Hilton Hotel on Copper. We were going on Copper, between Second and Third Street when I saw my family in the automobile. "There's my family," I said and asked him to stop and

65 I got out of his car and went over and yelled at my wife and she stopped. I got in my car and we circled around across Central and back out on North Second and took this boy back to his home out north of Albuquerque. I said nothing to my wife about this. We

visited with this boy's parents and later with my own parents and then went back to Socorro that evening about seven o'clock. As soon as we got home, I went into the bathroom and locked the door and took out the money—there was \$200 in currency—

Q. What money are you talking about?—A. The money I received from Mr. Sapir.

Q. Of that money you say there was \$200 in currency?—

A. Yes, sir.

Q. All right, Mr. Canfield, what was the next you heard about this man? Pardon me, withdraw that question. Did you see Ben Sapir again after the 13th of June, during the month of June, did you see him at all again, after that?—A. No, sir. I heard from him by phone on July 29th.

Q. Is that the first time you heard from him since the 13th of June?—A. Yes, sir, I am sure.

Q. You say the next time you heard from him was on the 29th day of July?—A. Yes, sir.

Q. What year?—A. 1953.

66 Q. All right, what happened? What did he say when you heard from him?

Mr. McLeod: If the Court please, we object to that. If our client had committed any crime, that would come after such time and would be immaterial.

The Court: Did you ask him for a statement made by the defendant himself?

Mr. Larrazolo: Yes. I asked him when was the next time he heard from Ben Sapir and he replied July 29th by telephone. Then I asked him what did the defendant, Ben Sapir, say.

The Court: (To the witness.) All right, you may answer.

Mr. McLeod: We object to that. No proper foundation has been laid.

The Court: Overruled. We are calling for a statement made by the defendant.

A. On July 29th, between eight and nine o'clock in the morning in my office, the telephone rang and I picked up

the phone and the operator said, "Long Distance from Albuquerque" and then I said "Hello," and it was Ben Sapir. He said, "This is Ben Sapir. There is a man up here checking on the aluminum."

67 The Court: Did you know it was Ben Sapir talking? Did you recognize his voice?—A. He said it was him and his voice was the same, sir. (Continuing.) He said there was an F.B.I. man checking around there and I said, "Well, I have been expecting it."

Q. Who said, "I have been expecting it"?—A. I said that. The conversation was very brief, it probably lasted twenty seconds. I don't recall all the conversation. I said, "I don't know what to do," and then I said, "Well, we will see," and then I hung up the phone and in a few minutes later Mr. Burns called on the telephone.

Q. Who is Mr. Burns?—A. He identified himself as a Special Agent.

Q. We will disregard conversation with anybody else. Did you have any more conversation with the defendant, Ben Sapir, on the telephone or otherwise?—A. During the noon hour, between twelve and one o'clock the same day, I was at home and received another long distance call from him and he was very excited—

Mr. McLeod: We object. Instruct the Jury to disregard it.

The Court: The Jury will disregard where he said he was very excited.

Mr. McLeod: We interpose the same objection of what was said at this conversation.

68 The Court: Overruled.

Mr. Larrazolo: If the Court please, we would like at this time to have the record show that Count One of the Indictment is a charge of conspiracy between these two individuals to defraud the United States.

The Court: The record shows that, Mr. Larrazolo. (To the witness.) Answer the question. What was said to you in that second phone call?—A. He asked me if the F.B.I. man had been down and I said, "No, but he is coming

down. He called me on the telephone and made an appointment with me and he is coming down this afternoon." After I told him about that, I said, "I have done wrong and I am going to get it off my chest."

Mr. McLeod: If the Court please, we object.

The Court: I believe that is justified. (To the witness.) What did the defendant say to you?

Mr. Larrazolo: If the Court please, this is pretty hard to say.

The Court: I am asking what did the defendant say to you? Go ahead, tell us what he said.—A. He told me not to be afraid—Mr. Sapir did. He told me to—Sapir said, "Tell them you were going to bill me later and just forgot to bill." And I, in turn, said—

Mr. McLeod: We object to what might have been said.

The Court: Go ahead. (To the witness.)

A. (Continuing.) He said, "Tell them you forgot to bill me," and then he said, "Remember, three hundred fifty ingots, forty pounds apiece." The conversation was ended then. I hung up the phone. He said, "Call me collect," and I said, "No," and he repeated, "Call me collect," and I hung up and just then the conversation was ended.

Q. Now, Mr. Canfield, how many statements did you
69 make to the Investigating Officers concerning this matter?—A. Two, sir.

Q. Did you, or did you not, admit these things in the first statement that you made?—A. In my first statement, sir, I said that all of the aluminum went into the car and it did not go in.

Q. You mean the railroad car?—A. Yes, sir.

Mr. McLeod: We would like to ask the prosecuting attorney to produce the statement, your Honor.

The Court: Can you produce the statement, Mr. District Attorney?

Mr. McLeod: While we are on that, I want the statement produced and I would like to have it read to the Jury.

The Court: Continue your examination. Ask your questions.

Mr. Larrazolo: (Continuing.) After you made that first statement?—A. Yes, sir, I made two statements.

Mr. McLeod: If the Court please, that is proper cross-examination, but it is not proper direct examination.

70 Mr. Larrazolo: If the Court please, we are asking for a certain statement—

The Court: (To the witness) Did you make another statement?—A. Yes, sir, made two statements.

The Court: (Addressing counsel.) You have no right to go into those statements on direct examination. Give them both the statements and if they cross-examine that, you may, on re-direct examination, ask any questions you wish. Until they are offered in evidence, then I wouldn't go further with it.

Mr. Larrazolo: That's all.

Cross-Examination by Mr. McLeod.

Q. How old a man are you, Mr. Canfield?—A. Thirty-five, sir.

Q. You have been working for the School of Mines since when?—A. June 16, 1947.

Q. What position did you start out with at the School of Mines?—A. As Property Clerk, sir.

Q. What are the duties of the Property Clerk?—A. Inventorying the property, keeping a card system on the property.

Q. All right. Now, you were working down there about six years, is that correct?—A. Yes, sir.

Q. And you never received any check from the
71 United States Government, Navy or Army, have you?—A. During my employment with them, sir?

Q. Yes.—A. No, sir.

Q. They have always been from the School of Mines?
—A. Yes.

Q. You were on their payroll?—A. I was, sir.

Q. The School of Mines paid you?—A. Yes, sir.

Q. You were employed by them?—A. Yes, sir.

Q. Now, during the month of June, did you pay Social Security?—A. I don't know, sir.

Q. You don't know whether you did or not? The records of the School of Mines would show that?—A. Yes.

Q. During the month of June of this year, was your wife sick?—A. Yes, sir.

Q. What was the matter with her?—A. She had a cold and was pretty miserable, sir.

Q. In fact, isn't it true you went to Mr. Sapir and told him you would like to borrow \$200 because your wife was sick?—A. No, sir.

Q. You didn't do that?—A. No, sir.

Q. Now, at all times you were attempting to help
72 Mr. Sapir get from the School of Mines the sum of \$991.75, which he claimed the School of Mines owed him, were you not?—A. What, sir?

Q. You were trying to help Mr. Sapir recover \$991.75, which Mr. Sapir claims the School of Mines owed him, weren't you?—A. He claimed the School of Mines owed him the money and I told him it was not in my capacity to take care of it, that he would have to see my superior.

Q. After this bid was accepted in May, he asked you about the \$991.75, didn't he?—A. Yes, sir.

Q. He sent you a check, which you saw didn't you, that was for the price of the aluminum, in the amount, less \$991.75?—A. Yes, sir.

Q. You then wrote him a letter and told him that the School of Mines didn't want to handle it that way?—A. Yes, sir.

Q. He came down to your place some time in July, July 7th, and gave another check to the School of Mines for \$991.75, didn't he?—A. Yes, sir.

Q. You took that check, didn't you, and turned it over to your superior?—A. Yes, sir.

Q. The deal was with your superior and you had
73 been trying and trying and trying to help Mr. Sapir get this \$991.75, hadn't you?—A. I didn't know on what basis the School owed Mr. Sapir this \$991.75, sir. I said to him, "We will do certainly what is right," and I referred him to my superior.

Q. You talked to him about it several times, didn't you?—A. Yes, sir.

Q. Mr. Canfield, I first show you Plaintiff's Exhibit 2, and ask you what that is?—A. Yes, sir.

Q. What is that?—A. This is a bid that I put out on the sale of this resmelted aluminum.

Q. You put that out and sent it to scrap dealers around the State?—A. Yes, sir.

Q. You put in there, approximately 100,000 pounds of resmelted aluminum?—A. Yes, sir.

Q. You also listed brass from oil radiators in there?—A. Yes, sir.

Q. Do the radiators belong to the School of Mines or do they belong to somebody else?—A. They were part of this same sale, sir.

Q. This bid, Number 27, did you advertise this
74 bid in the newspaper in Socorro?—A. Yes, sir.

Q. Do you have a copy of that bid, or did the School of Mines have a copy of that bid?—A. Originally, yes.

Q. When you had a copy of that bid placed in the newspaper, did anybody at the School of Mines ever keep a copy of such bid?—A. Yes, sir, it should be on file there.

Q. In the file down there?—A. Yes, sir.

Q. Directing your attention to Plaintiff's Exhibit 2, which is called "Invitation, Bid and Acceptance," there is nothing on that from beginning to end—now, take a good look at it—there is not one word on that—

Mr. Larrazolo: (Interrupting.) If the Court please, I believe the Invitation speaks for itself.

The Court: This is cross-examination. Ask your question.

Q. There is nothing on it that says anything about any Government property, is there?—A. (Witness examines Plaintiff's Exhibit 2.) No, sir.

Q. It says the School of Mines, doesn't it?—A. Yes.

Q. That's all it says, isn't it?—A. Yes, sir. I made this form. I put this out.

Q. There is nothing about any Government prop-
75 erty mentioned?—A. No, sir.

Q. There was nothing said about any Government property in that bid. All right, now, Mr. Sapir was the successful bidder, wasn't he?—A. Yes, sir.

Q. And you wrote him a letter on May 25th advising him of that fact?—A. Yes, sir.

Q. I show you what has been identified as Defendant's Exhibit B and ask you to state whether or not that is your signature or is it signed by some other person in your office?—A. It is signed by my secretary.

Q. It is a letter you dictated, is it not?—A. Yes, sir.

Mr. McLeod: We offer in evidence at this time Defendant's Exhibit B.

The Court: That is a letter accepting the bid?

Mr. McLeod: Yes, your honor.

Mr. Larrazolo: No objections.

The Court: It is admitted.

Mr. McLeod: I would like to read this letter to the Jury, your Honor.

(Counsel reads Defendant's Exhibit B to the Jury which is printed at page 151.)

76 Q. Now, is there one thing in there that says it was a Government bid that was accepted, Mr. Canfield?—A. No, sir.

Q. You didn't tell him the Government bid had been accepted, did you?—A. No. This is the type of letter I always sent out.

Q. Now, Mr. Canfield, you had charge of the sale of aluminum scrap under what was known as Bid Number 23, didn't you?—A. Yes, sir.

Q. And at that time, you offered for sale some approximately 55,000 pounds of aluminum scrap?—A. It was 25,000 pounds, yes, sir.

Q. Mr. Sapir was high bidder on that, was he not?—A. Yes, sir.

Q. Now, he was high bidder and the bid was awarded to him, is that correct?—A. Yes, sir.

Q. Then he advised you—or rather, you advised him that there was down there at that time approximately 55,000 to 60,000 more pounds of aluminum, didn't you?—A. Yes, sir.

Q. When was that, do you recall?—A. No, sir, I don't.

Q. Before this particular transaction, was it?—A. Yes.

77 Q. You told him that you had a lot more, if he was interested in buying that aluminum at the same price?—A. Yes, sir.

Q. And he bought from you at that time approximately how many pounds of aluminum?—A. I don't remember, sir. He bought above the bid of 25,000 pounds—it amounted to as high as sixty to eighty thousand pounds.

Q. There wasn't a thing in the wording said in that bid about any Government property, was there?—A. No, sir.

The Court: Was there anything in that bid about Government property?—A. No, sir.

Q. Mr. Sapir already paid you on that bid. He paid you \$4,287.50 that was offered under his bid, didn't he?—A. Yes, sir.

Q. He paid you with his check?—A. Yes, sir.

Q. The check went to the School of Mines, is that correct?—A. Yes, sir.

Q. Directing your attention to Defendant's Exhibit C which is a United Iron and Metal Company check in the sum of \$4,287.50, when you received that, that was certified, was it not?—A. Yes, sir.

78 Q. By the First National Bank in Albuquerque?—A. Yes.

Q. You received that?—A. Yes, sir.

Q. That took care of the 25,000 pounds of aluminum on Bid No. 23?—A. This was a deposit, sir, on that bid.

Q. That was a deposit on that bid? Later, then, he sent you a check identified as Defendant's Exhibit D and that was to pay for the balance of approximately 80,000 pounds of aluminum, wasn't it?—A. Yes, sir.

Q. Now, that last check, Defendant's Exhibit D, Mr. Sapir deducted out of that \$991.75, didn't he?—A. I don't remember whether it was that one or the one on the bid later, sir.

Q. As a matter of fact, the bid later was sometime in May, wasn't it? He discussed that with you and you told him the School of Mines would not go along on those conditions, didn't you?—A. Yes, sir.

Q. And you saw to it that Mr. Sapir sent you, or the School of Mines another check for \$991.75?—A. Yes.

79 Q. You called Mr. Sapir, after he opened the bid on the 25,000 pounds of aluminum, and told him you had some more aluminum ingots to sell and he said he would take them off your hands at the same price?—A. Yes, sir.

Q. And he sent you a check for it?—A. Yes, sir.

Q. Then you called and told him your price of aluminum had gone up considerably?—A. Yes, sir.

Q. He then asked if he could get out of that extra amount of poundage, didn't he?—A. Yes, sir.

Q. You said you would see what you could do?—A. Yes.

Q. You did see what you could do?—A. Well, sir, I talked to Mr. Sweet and when Mr. Sapir came down later, I referred him to Mr. Sweet in my office there.

Q. As a matter of fact, he was refunded there on that deal the sum of \$9,209.55, wasn't he?—A. Yes, sir.

Q. You know that of your own knowledge?—A. Yes, sir.

Q. He went on down there and moved out 25,000 pounds of aluminum, didn't he?—A. Yes, sir.

80 Q. But the rest of it was allowed to remain on the ground?—A. Yes, sir.

Q. You continued to allow your scrap and aluminum ingots to be stacked on the ground?—A. Yes, sir.

Q. They were all stacked together?—A. Yes, sir.

Q. I hand you what has been identified as Defendant's Exhibit F and ask you to state what that is, if you know?—

A. Yes, sir. It is a Notice of Bid, or rather Notice of Publication where I advertised for bids.

Q. There is not one thing said about the sale of Government property in that advertisement, is there?—A. No, sir.

Mr. McLeod: At this time, the defendant offers in evidence Defendant's Exhibits C, D, E, and F.

Mr. Larrazolo: Just a minute. We object to the introduction of Defendant's Exhibits C and D on two grounds, your Honor. Both checks were made out by the defendant, Ben Sapir, yet these are photostatic copies and not the originals, which should be in his possession, and, they

should be introduced with the defendant, Ben Sapis, and not with this witness. There is no showing on these checks that this witness cashed these checks and they should be introduced with the proper witness, the defendant himself.

81 Mr. McLeod: Those checks that are certified are never returned to the person that has them certified, they are kept by the Bank.

The Court: If the Government demands the original checks be produced, they are entitled to make that demand.

Mr. Larrazolo: We certainly do demand the original checks. Our objections are on the grounds only that the checks are not the originals.

The Court: That objection is sustained.

Mr. Larrazolo: With reference to Defendant's Exhibit E, your Honor, which is a purported copy of a check made by the School of Mines, I don't see that this defendant issued that check from the office of the School of Mines.

The Court: He identified it.

Mr. Larrazolo: Not as having issued it himself.

The Court: Is it an original check?

Mr. Larrazolo: This is a photostatic copy of the check and our objection is on the grounds that it is a copy.

The Court: Don't object on those grounds. Overruled. It is admitted in evidence as part of the cross-examination of this witness.

Mr. McLeod: (Resuming cross-examination.) Now, Mr. Canfield, you have been indicted along with Ben Sapis in this case, have you not?—A. Yes, sir.

82 Q. You have entered in this Court a plea of "guilty," have you not?—A. Yes, sir.

Q. And you are, at the present time, employed in El Paso?—A. Yes, sir.

Q. You have never, up to this day, been sentenced?—A. No, sir.

Q. Now, you have had many, many conferences with the

man from the Federal Bureau of Investigation, haven't you?—A. You mean in connection with this?

Q. Yes.—A. Approximately four or five times, sir.

Q. Four or five times you have talked to them. What, if anything, have they promised you?—A. Nothing, sir.

Q. Have they told you the thing to do was to help the Government?—A. No, sir.

Q. What did they tell you?—A. I entered my plea of "guilty," sir, after thinking it over with my attorney.

Q. You had talked to these men and given them a written statement, had you not?—A. Two, sir.

Q. You only gave them two statements?—A. Yes.

Q. The first one said the aluminum ingots did
83 go into the railroad cars?—A. Yes.

Q. As a matter of fact, didn't you, the first time you talked to the F.B.I. tell them Mr. Sapir had stolen this stuff and you didn't know anything about it?—A. I said the ingots went into the car, yes. And I told them the next time that Mr. Sapir had offered to take care of me, sir.

Q. That he would take care of you? Did you say how he would take care of you?—A. No, sir.

Q. Did he say when he was going to take care of you?—A. No, sir.

Q. Now, you said he kept talking about extra weight and I believe you said at first you would put it into the car?—A. Yes, sir.

Q. Then, he decided he would drive the truck up here, is that correct?—A. Yes, sir.

Q. That day you say you saw Mr. Sapir here in Albuquerque, who was in the car with you?—A. My wife.

Q. I mean in the Sapir car, who was with you?—A. Mr. Sapir and myself.

Q. Didn't Mr. Sapir's partner ride part of the
84 way with you that day?—A. He might have been with us for a few minutes.

Q. Now, you had contacted Mr. Sapir on one occasion to tell him that there was additional aluminum at that time that he could get, hadn't you?—A. I believe he contacted me, sir. He contacted us.

Q. As a matter of fact, he put in a bid for 25,000 pounds and you asked if he wanted to buy the rest of it, didn't you?—A. Yes, sir.

Q. You brought it to his attention, didn't you?—A. I believe he called—

Q. You were trying to help him recover from the School of Mines the \$991.75 item, weren't you?—A. I referred him to the proper authority, my superior. I knew nothing about that.

Q. You did talk to him about it?—A. I did certainly say we would do what was right. We were not trying to beat anyone out of any money and I referred him to my superior, Mr. Sweet.

Q. On about July 7th, 1953, did you see Mr. Sapir?—A. Did I see him, sir?

Q. Yes.—A. I don't know, sir.

Q. Did he bring you down a certified check, payable to the School of Mines, to cover the \$991.75 item that the School said they would not handle the way it had been handled?—A. I don't recall whether he mailed it or brought it down, but I can't say for sure whether he brought it in person or not, I don't recall.

Q. Did you give any other statements to the F.B.I. other than the two you referred to?—A. No, sir.

Q. You talked to the F.B.I. on at least four or five occasions?—A. Yes, sir.

Q. What are the names of the men you talked to?—A. I only talked to Mr. Burns.

Q. What, if anything, did he say to you?—A. He questioned me, sir.

Q. At length?—A. Yes, sir.

Q. And continued to question at length?—A. Yes, sir.

Q. He never at any time told you they would go easy with you or anything of that kind?—A. No, sir.

Q. How long have you been working in El Paso?—A. Since about the 12th of September.

Q. Mr. Canfield, I now refer you to the original checks which bear the same numbers as the photostats, which are identified as Defendant's Exhibits C and D and ask you, do the photostats apply to these two original checks?—A. Yes.

Q. Directing your attention to the back of these checks, state what the first endorsement is on them?—A. "First State Bank, Socorro, New Mexico, for deposit only, New

Mexico Institute of Mining & Technology, Comptroller's Account."

Q. There is nothing in that endorsement about it being part of the Government?—A. No, sir.

Mr. McLeod: At this time, we offer the originals of the checks, which were marked Defendant's Exhibits C and D.

Mr. Larrazolo: If the Court please, we object to the introduction of these checks on the grounds that this witness here did not endorse these checks and is not the responsible finance officer of that Institution and on the further grounds that the proper witness with which to introduce these checks is the person who made them out, the defendant, Ben Sapis. He should be put on.

The Court: Overruled. Admitted as part of the cross-examination of this witness.

87 Mr. McLeod: We will now substitute these original checks for the photostatic copies and let them bear the exhibit numbers as Defendant's Exhibits C and D. That's all.

Re-Direct Examination by Mr. Larrazolo.

Q. Mr. Canfield, during the time you say the defendant Ben Sapis, told you he would take care of you if you permitted this extra weight on June 12, 1953, was anything said by him or you with reference to those checks that Mr. McLeod is making so much about?—A. No, sir.

Q. In other words, on June 12, 1953, there was no discussion between you and the defendant, Ben Sapis, concerning any previous sales by the School of Mines to Ben Sapis, was there?—A. No, sir. We were only concerned with this particular sale right here.

Q. The only thing said to you was with reference to that particular sale on June 12, 1953, that he would take care of you?—A. Yes, sir.

Q. He actually did take care of you, didn't he? He gave you \$200?—A. It looks that way, sir.

Mr. Larrazolo: That's right.

PETER S. ELY testified as follows:

Direct Examination by Mr. Robins.

88 Q. State your name, please?—A. Peter S. Ely.

Q. Where do you live?—A. Socorro, New Mexico.

Q. What is your present position?—A. Mine Superintendent.

Q. Have you ever had experience in work at the Socorro School of Mines?—A. I have been employed there for some six to eight months, sir.

Q. When was that?—A. From May of 1952 to January of 1953.

Q. Did you ever have any work in connection with the resmelting program down there?—A. Not directly, no sir.

Q. Are you familiar with the process they had at the School of Mines with regards to smelting scrap metal?—A. Yes, sir.

89 Q. Have you ever seen any of the aluminum ingots smelted at the School?—A. Yes.

Q. Directing your attention to June 12, 1953, Mr. Ely, at approximately six o'clock p.m., tell the Court and Jury where you were at that time?—A. I was at the Westward Ho Cafe, slightly North of the main shopping section of Socorro.

Q. Did anything out of the ordinary occur at that time?—A. At the time I didn't realize it was out of the ordinary.

Q. Was something called to your attention, Mr. Ely?—A. Yes.

Q. What was that?—A. I saw a truck load, or partial load, of what I believed to be these ingots, headed North on 85.

Q. How high up? How much of the capacity of the truck was filled?—A. Well, that's a pretty difficult question, sir—

Mr. McLeod: If that's a difficult question for the witness to answer, we will object to guessing.

The Court: You may answer if you can.

A. I can't answer that, sir.

Mr. Robins: I believe that's all.

Mr. McLeod: No questions.

The Court: You may go.

SAM J. ZIMMERLY testified as follows:

Direct Examination by Mr. Robins.

90 Q. State your name, please?—A. Sam J. Zimmerly.

Q. Where do you live?—A. Socorro, New Mexico.

Q. By whom are you employed?—A. Atchison, Topeka, and Santa Fe Railroad.

Q. In what capacity?—A. Station Agent.

Mr. McLeod: If the Court please, could the witness speak louder?

The Court: Speak louder so that counsel and the jury can hear you.

Q. Directing your attention, Mr. Zimmerly, to June 12, 1953, are you familiar with the loading of a railroad car with aluminum ingots?—A. To what extent, may I ask?

91 Q. Let me ask you this: Did a truck load containing aluminum ingots come to your yard from the School of Mines?—A. I didn't see any truck loads come in myself. Several came, but I didn't see them.

Q. Did you have a car provided to you for loading aluminum ingots?—A. Yes, sir.

Q. By what authority did you have that car?—A. The car was ordered through the Albuquerque office here. They communicated by telephone and I furnished the car.

Q. Do you know what went into that car?—A. Yes, sir.

Q. What was that?—A. Ingots of aluminum.

Q. Did you actually see yourself any of the loading of the railroad car?—A. I didn't see any of the actual loading, no sir.

Q. Do you know Ben Sapis, the defendant here?—A. Yes, I believe I do know the man, yes, sir.

Q. Did you see him on June 12th?—A. Yes, sir.

Q. Did you have any conversation with Mr. Sapis on June 12th?—A. Well, yes, in the regular routine of business. He called at my office and discussed the billing of a

car that was being loaded there that day. A carload of aluminum.

Q. Did he get a bill of lading?—A. Yes.

92 Q. Do you have that bill of lading with you?—A. This copy, yes, sir. (Witness produces a paper.)

Q. That is your copy?—A. My copy, yes, sir.

Q. You furnished him with a copy?—A. He has the original bill of lading, yes, sir.

Q. Could you take that out of your file there that you have? Do you have that in your file there?—A. Yes, sir.

Q. Who wrote the bill of lading out?—A. Mr. Sapir.

Q. And does that show where the car would be sent to?—A. Yes, sir.

Q. Where does it say?—A. The destination is Los Angeles, California.

Q. Does it give the person who would receive it?—A. Yes, sir.

Q. Who was that?—A. Federated Metals Division, American Smelting and Refining Company.

Q. Had the car been completely loaded at the time the bill of lading was given to Mr. Sapir?—A. No.

Q. Did you have any conversation with him about that?—A. Yes, Mr. Sapir offered the billing on it and I asked him if he was through with the car, and he said no, there was one load to go in the car yet.

Q. What time was that?—A. I imagine right
93 around three o'clock. It might have been after that, or a little before three.

Q. Did you leave there shortly thereafter?—A. I didn't leave the premises until about three forty-five or four o'clock, maybe.

Q. At the time you gave him that bill of lading, was there any agreement between you and Sapir as to another load going into the car?—A. My understanding was that there would be another load.

Q. I hand you what has been marked Plaintiff's Exhibit 6 and ask you what this is?—A. A railroad scale weight ticket—Santa Fe Railroad Scale Weight Ticket.

Q. What does—is that made out by you?—A. This is made at our first scale, which happens to be in Belen, New Mexico.

Q. How did that come into your possession, Mr. Zimmerly?

Mr. McLeod: If the Court please, we object. If it came through the first scale, it would be hearsay.

The Court: Well, I don't know—he hasn't yet offered it.

Q. How did it come into your possession?—A. I requested it from the Agency.

Q. When did that come into your possession?—A. This is a certified copy and it came into my possession about the 17th of October.

Q. October 17th, 1953?—A. Yes, sir.

94 Q. Does that show the weight of the railroad car?—A. Yes, sir.

Q. Does that show the weight of the contents of the car?—A. Yes, sir.

Q. What was the weight of the railroad car?—A. The car itself weighed 46,000 pounds.

Q. And what is the total weight of the car and the contents?

Mr. McLeod: If the Court please, we object to this. It is hearsay.

The Court: So far as this witness is concerned, it is hearsay.

Mr. Robins: If the Court please, it is a copy of a document that came in the usual course of business to this person.

The Court: Of course, you are asking him to testify to specific matters, not an opinion. You have not offered the copy and as to that to which he has testified, he would be the best witness.

Mr. Robins: (Resuming.) Where is the original of this, Mr. Zimmerly?—A. The original is attached to the weight bill at the destination, in Los Angeles.

Q. That went with the weight bill to Los Angeles?—A. Yes.

Q. To the person who received this shipment, is that correct?—A. No, it remains with the railroad record. It is what they assess freight charges on.

Q. May I see this other bill of lading? I hand you this paper and ask you what this is?—A. This is a copy of the weight bill. It is what the car moves for train service.

Q. And that is your copy you have in your office?—A. My permanent copy, yes, sir.

Q. Without telling the contents of this, what does this show?—A. It shows the name of the shipper, the man on ships, and the consignee or receiver, the contents—

The Court: You said the original was given to the defendant?

A. This is a weight bill, scale ticket. It shows the date of the shipment and the hour, the car load and the car number, and a pencilled notation of the scale ticket received from Belen, which was furnished at my request.

Q. This shows the weight of the car and the contents of the car?—A. Yes, sir.

Mr. Robins: We offer this in evidence.

Mr. McLeod: We offer the same objection, your Honor. He came from Belen, he is in Socorro.

The Court: You say the defendant had the original of it?—A. The original goes to the destination, attached to the railroad weight bill and a carbon copy of the same. This time is given to Mr. Canfield.

Q. A carbon copy is given to Canfield?—A. Yes, sir, Canfield.

Mr. Robins: We offer this in evidence, at this time, your Honor.

The Court: I will sustain the objection.

Mr. Robins: That's all.

Cross-Examination by Mr. McLeod.

Q. Mr. Zimmerly, you said you left that afternoon about four forty-five?—A. Yes, sir, about that.

Mr. McLeod: That's all.

The Court: No redirect?

Mr. Robins: No redirect.

The Court: You may go. Call your next witness.

RICHARD NEWTON HEATHCOCK testified as follows:

Direct Examination by Mr. Robins.

Q. State your name, please?—A. Richard Newton Heathcock.

The Court: Speak good and loud.

Q. Where are you employed?—A. New Mexico School of Mines.

Q. In what capacity are you employed?—A. I was in charge of resmelting this scrap aluminum, which became an issue involved in this case.

Q. Now, Mr. Heathcock, in your capacity as supervisor of this smelting process, do you know where the aluminum or where the scrap metals came from?—A. Yes, I do. It came from our experimental work under Navy Contract.

Q. And do you know where the people who conducted the experimental work received that material from?—A. Yes, I have seen the bills of lading where it was shipped into Commander Gill. He is Development Contract Officer in charge of receiving such things.

Q. Do you know whose property that is, Mr. Heathcock?

Mr. McLeod: If the Court please, we object to that. It calls for a conclusion of the witness.

The Court: Does he know whose property that is?

A. Property of the United States Government, so far as I know, under this contract, which is a Navy contract.

Q. Now, Mr. Heathcock, when that property comes to the School of Mines, who works on it first?—A. Well, the Navy. Under the Navy Reserve Project, they do experimental work on this material, that is the use that it is shipped in for and then turned over to me to be changed from scrap metal to ingot form, for better sale and delivery.

Q. Before you start the smelting of that, does that

scrap metal have any identifying marks on it?—A. Well, when it is used in experimental work, it has marks from that work that would make it recognizable. It could be recognized, I believe, from the marks that were on it.

Q. Is that another reason why the scrap metal was
98 smelted?—A. I understand that's one of the primary reasons it is smelted, to make it unrecognizable after it is melted. It is recognizable before it is melted.

Q. Directing your attention to June 12th, Mr. Heathcock, did you observe any of the aluminum ingots, which you had supervised the processing of, around the School of Mines?—A. Yes, that was the day that we made this largest shipment or purchase. We had on hand some 26,000 ingots at the time, which was all we had. We shipped the entire load on that date, June 12th.

Q. And these ingots were the materials you had supervised the smelting of?—A. That's right.

Q. I hand you what has been previously marked Plaintiff's Exhibit 5 and ask you what that is?—A. This is a picture I took on June 11th of the furnace and two piles of ingots resulting from my operation.

Q. This was taken on— —A. (Interrupting.) June 11th, the day before the shipment.

Q. Do you make that a practice, Mr. Heathcock?—A. During the run of the operation I took, or had taken, various pictures to show the operation of the furnace where we smelted the aluminum, and showing the piles of ingots, just as a record of the operation.

99 Mr. Robins: I offer this in evidence at that time.

Mr. McLeod: We have no objection to the picture, but we do object to the writing on the back of the picture, your Honor.

The Court: What is the writing on the back? (Court examines Plaintiff's Exhibit 5.) I will admit the picture, but don't turn it over! The writing on the back of the picture is not received into evidence.

Q. As of June 12th, did you exhaust your supply?—A. They exhausted our supply, except for keeping materials practicable for operating. They exhausted the pile of ingots.

Q. Did you see the trucks being loaded?—A. I was

there off and on during the day and saw a good part of the first load being hauled away.

Q. Now, do you have any idea, Mr. Heathcock, as to what the total amount of ingots carried away that day would weigh?—A. I have a pretty good idea. In my estimation—

Mr. McLeod: (Interrupting.) If the Court please, there has been no foundation laid for that.

The Court: He may answer it.

A. Throughout the operation we weighed the ingots and kept a daily total of the number of ingots we had. A general count is the basis for saying what each ingot would weigh. In my estimation there was 110,000 to 113,000 pounds, as represented by this picture here. (Witness refers to Plaintiff's Exhibit 5.)

Q. Now, subsequent to June 12th, did you ever question the weight that you learned was listed as being the total amount of ingots delivered?—A. Yes, I did. I was very much surprised when I got the weight back. It was very definitely low.

Q. What was the railroad weight for the ingots?

Mr. McLeod: We object to that if somebody told him that.

The Court: What the railroad weight for the ingots was? Do you know that?

A. Yes, sir, I do.

The Court: How do you know?

A. I asked Mr. Canfield for the figure for my own personal records.

The Court: When did you ask him?

A. I am not too sure of the date, sir. It was weighed at Belen and I asked him several days after that.

The Court: Several days afterward? And the information was furnished by Mr. Canfield? I think the rule is, that arrangements made after the conspiracy is ended would be hearsay. I will sustain the objection.

Mr. Robins: (Resuming.) You testified you felt, or you learned, that the shipment was light. What did you do with regard to that?

101 A. The first thing I thought of was, since I was not present—in fact, none of my men were present when the last truck load left—and I figured if there was any discrepancy, it would be there.

Mr. McLeod: I object to what might have been figured.

The Court: Members of the Jury, don't consider what he figured.

Q. Did you take any action in regard to this information you received, Mr. Heathcock?—A. Yes, I did. I had a man, Mr. Ulivarri, working for me. He was the person counting the first three truck loads, and I told him to go to one of the men hired locally to make that load and ask him to find out—

The Court: (Interrupting.) If you are about to say what somebody else told you, don't say it. Hearsay evidence is not permissible in a Court of law.

Mr. Robins: That's all.

Cross-Examination by Mr. McLeod.

Q. You helped bring this smelter there, Mr. Heathcock?—

A. Yes, sir.

Q. It was bought by the School of Mines, was it not?—

A. Yes, sir.

Q. Bought for the purpose of adding to the revenue of the School of Mines, was it not?—A. I am afraid I am not too clear on that point. It was bought under the Navy contract.

102 Q. Bought by the School of Mines?—A. I would say, rather, it was bought by the Navy on requisition made out for material and labor. It came from the Navy contract, authorized by the Navy contract.

Q. If you melted the metal scrap, the School of Mines received more money, didn't they?—A. The money, I understand—

Q. (Interrupting.) Tell us what you know, Mr. Heath-

cock.—A. Well, the money went back into the same Navy contract that bought the smelter.

Q. If the money the School of Mines got was more than had been put in, that continued to make the Navy contract last longer, didn't it?—A. I believe so.

Q. So, this smelter was bought for the purpose of helping the School of Mines get more money, wasn't it?—A. That and for the purpose of disguising this material that had been used in experimental Navy work.

Q. Now, the weight—you kept no weights on those ingots that came out of there?—A. We weighed them at various times and each day we kept a running total and we could tell very easily what the approximate weight was.

Q. You kept a running total and could make a
103 guess, but you couldn't give an accurate weight right down to pounds and ounces, could you?—A. You mean—well, no, I couldn't know within the pound, sir.

Q. Each one of those ingots weighed differently, didn't it?—A. That's true.

Q. As a matter of fact, they weighed roughly approximately forty pounds?—A. Rather, forty-five pounds.

Q. It could be off ten pounds one way or the other, couldn't it?—A. I'd rather say five pounds.

Q. How many of them were left?—A. In this particular shipment?

Q. When this picture (Counsel refers to Plaintiff's Exhibit 5.) was made, that we've seen here today.—A. In this pile here, there were 800 ingots and in this pile there were 1801.

Q. You could look at your books and could you tell what they weigh? You said a while ago approximately, I believe, somewhere around one hundred ten to one hundred fifteen thousand pounds?—A. One hundred ten to one hundred thirteen thousand pounds, sir.

Q. What I was referring to, you didn't know exactly, did you?—A. No, sir, we didn't.

Q. They could have been off as much as five
104 pounds on a thousand of them, couldn't they?—A. I don't quite get that—

Q. You say you had 800 in one pile and 1600 in the other?—A. 800 in one and 1801 in the other.

Q. 800 in one and 1800 in the other, 2600 of them?—A. Yes, sir.

Q. Then you had 2600 different bars of metal, didn't you?—A. Right.

Q. And each and every one of them could have been off or half of them could have been off five pounds, couldn't they?—A. It's possible.

Mr. McLeod: That's all.

Re-Direct Examination by Mr. Robins.

Q. Why weren't these ingots weighed at the school?—A. They were to be loaded in the railroad car and weighed at Belen and they were to be paid for on the railroad weight.

Mr. McLeod: If the Court please, we object. There has been no foundation laid for that.

The Court: Counsel asked what?

Mr. Robins: Why the ingots were not weighed at the School.

A. We didn't have the facilities for weighing them, is probably the primary reason.

Q. You don't have scales there?—A. No, sir, nothing for that sort of thing.

105 Mr. Robins: No further questions.

MARVIN L. KEMPTON testified as follows:

Direct Examination by Mr. Larrazolo.

Q. State your name, please?—A. Marvin Lawrence Kempton.

Q. What is your occupation?—A. Project Supervisor for the Navy Project at the New Mexico School of Mines.

Q. How long have you been in that position?—A. About four years.

Q. You have been in that position starting four years ago?—A. I came to work for the School of Mines in November of 1946 and gradually worked into the position—it was about 1949, I would say.

Q. Upon which payroll are you, Navy or School?—A. School payroll.

Q. Mr. Kempton, as Supervisor of this Project, do you have occasion to receive any equipment from the Navy or any outside concern, shipped to the grounds of the School of Mines?—A. Yes.

Q. Do you have any consignment papers with respect to any of those shipments?—A. Yes, I do.

Q. Take them out please and just hold onto those.
106 Now, Mr. Kempton, do those consignments in your hand all represent shipments from the same shipper to the same consignee?—A. No, they represent a good many different shippers to one consignee, that is, the Development Contract Officer, Commander Gill.

Q. Mr. Kempton, are you familiar with—is it or is it not a project involving the Navy and the School of Mines? Is it not a purchase under that contract?—A. Yes, it is.

Q. What does that project cover? What is the nature of it, within the bounds of security classifications?—A. A research project. We are selling research work to the Navy.

Q. What does it involve? What kind of shipments does the Navy make in order to carry out its project?—A. Well, I can mention some things without divulging valuable information, such as, aircraft parts and structures, aircraft components and missiles.

Q. They are parts involving aircraft from the Navy to the School of Mines? Navy property delivered to the School of Mines?—A. Each consignment is to be delivered to the location of the School of Mines.

Q. Take one out please and just open it up. (Witness produces paper from his file.)
107 Now, what does that particular one you have there cover?—A. It says: two damaged wings, Aircraft, OIF Classification, 4,000 pounds, weight, destination Socorro, New Mexico, consigned to DCO, Socorro School of Mines, Socorro, New Mexico from Salt Lake, Hill Field, Utah.

Q. What type of installation is Hill Field?—A. Government installation.

Q. What part of the Government?—A. I imagine Air Corps.

Mr. McLeod: We object to that and ask that it be stricken.

The Court: Sustained.

The Witness: Could I find one that I know something about?

Mr. Larrazolo: Certainly, yes.

A. I have several here that I think are good enough. (The witness refers to papers in his hand.) This one is from Lexington, Tennessee, the Naval Air Station in Lexington, Tennessee, Airplane propeller, taken from the F7F type of Aircraft, the consignee is Development Contract Officer at the School of Mines, Socorro, New Mexico.

Q. Who was that consigned to?—A. Development Contract Officer.

Q. Who is that?—A. Commander Gill.

Q. Development Contract Officer of the Navy, is that correct?—A. He is the New Mexico School of Mines Contract Officer.

Q. Who does he represent?—A. The United States
108 Navy.

Q. Mr. Kempton, are you familiar with the smelting operations going on at the School of Mines in Socorro?—A. Yes, sir, it is under my supervision.

Q. Under your direct supervision?—A. Yes, sir.

Q. Do you know where the equipment came from which was smelted to form those ingots kept there at the School of Mines?—A. Yes, sir. They came from these. (Referring to papers he holds.)

Q. Can you tell from what service they came or what department they came?—A. If I looked at one bill of lading, could I tell from what aircraft it came?

Q. What department of the Government or what private agency, or where it came from?—A. I can answer that by saying, only these shipments were smelted.

Q. You still haven't answered my question. I am asking you whether you can tell where the shipments came from, which produced those ingots after they were smelted?—A. I can tell before the smelting operation.

Q. Where did they come from?—A. Various Government agencies. They are sent in for experimental purposes

and after the work is completed and all reports made, then they are smelted.

Q. Who owned all of these parts of airplanes?

109 Mr. McLeod: We object. That is calling for a conclusion of the witness.

The Court: You may answer.

A. These were owned by the United States Navy, consigned to the Development Contract Officer to our facilities for development in research work.

Q. You are in charge of that project?—A. Right.

Q. After they are smelted, to whom do the aluminum ingots belong?

Mr. McLeod: Same objection, your Honor.

The Court: Overruled.

A. There was never a transfer or any sort of paper work and therefore they obviously—

Mr. McLeod: Objection.

The Court: (Addressing the witness.) You understand the question?—A. Yes, sir.

The Court: Who did they belong to?

A. They belonged to the Navy.

Q. If I understand you correctly, these items, from the time they arrived at the School of Mines until they were smelted and turned into ingots and left on the grounds of the School of Mines, were Government property, is that correct?

110 Mr. McLeod: Objection, that's repetitious and leading.

The Court: Rather bad leading too.

Mr. McLeod: Yes, very.

Q. I show you what has been identified as Plaintiff's Exhibit 5 and ask you whether these ingots are a result of the work being done at Socorro School of Mines?—A. Yes, sir, that is our work.

Q. Did you have these trucks containing ingots there on or about June 12th, 1953?—A. June 12th, yes, sir, I did.

Q. They were on the School grounds there, is that right?—A. Yes.

Q. Now, Mr. Kempton, do you know whether these ingots which you saw in this picture here are the ones that were taken from there by Mr. Sapir? Now, if you don't know of your own knowledge, don't answer.—A. I saw one of Mr. Sapir's trucks loading them, yes, sir.

Q. You saw them loading all of the ingots?—A. No, I was busy during the day and didn't see all the stuff loaded.

The Court: I want to ask a question, though defense counsel may object: Did you ever do any of this kind of work for any private agency or corporation, and so on?

Mr. McLeod: We object to that question on the grounds it is calling for a conclusion of the witness based upon his knowledge—

111 The Court: Overruled.

Mr. McLeod: Exception.

A. You mean me, personally? Well, at the project down there I never did it before, but in Albuquerque at the Airfield I worked during the war, but down there, no, sir.

Cross-Examination by Mr. McLeod.

Q. Mr. Kempton, how long have you lived in New Mexico?—A. Since the Fall of 1946.

Q. Where did you live prior to that?—A. Washington, D. C.

Q. What did you do there?—A. I was with the Walter Reed General Hospital doing research work.

Q. Did you ever apply to the F.B.I. for items?—A. No, sir.

Q. Were you in the Army?—A. Yes, sir.

Q. What division were you in in the Army?—A. I was assigned to the Medics in a special engineering group.

Q. Ever in the Military Police?—A. No, sir.

Q. Now, you reported this incident to the F.B.I., didn't you?—A. I did not personally report it.

Q. You gave orders to have it reported to the F.B.I.?—

A. I gave the information to Dr. Workman, my superior.

Q. You never at any time notified the Navy of
112 this did you?—A. No, sir.

Q. You are paid by the School of Mines, are you not?—A. I am, sir.

Q. Dr. Workman is paid by the School of Mines, is he not?—A. He is to the best of my knowledge, sir.

Q. And the School of Mines is an institution of the state of New Mexico.—A. Yes, sir, it is.

Q. Now, you have been working at Socorro since about 1946?—A. I worked here until 1949, working for the School of Mines, and went down there later, yes.

Q. Every check you ever received in connection with your work was from the School of Mines?—A. From check I ever received, to the best of my knowledge, yes.

Q. You said you were there that day when one of the trucks was loaded?—A. I saw parts of more than one load.

Q. You were not around there all day?—A. No.

Mr. McLeod: No further questions.

The Court: Redirect?

Mr. Larrazolo: Nothing further.

FRED R. SWEET testified as follows:

Direct Examination by Mr. Larrazolo.

Q. State your name, please, sir.—A. Fred R.
113 Sweet.

Q. What is your occupation?—A. Comptroller at the New Mexico School of Mines.

Q. Mr. Sweet, I show you three checks here, which have been marked Defendant's Exhibits C, D, and E, and ask you to inspect them and see if you know what they represent?—A. Yes, sir, I recognize these checks. They represent payment for aluminum purchased from the New Mexico Institute of Mining and Technology, under bids—I can give you detailed information on these—

Q. Take them out please.—A. Yes, sir. (Witness removes papers from his brief case.) \$4,287.50 was received from United Iron and Metal Company as a deposit on Bid Number 23. I believe it is for scrap aluminum—

Q. Just a minute. What is the date on the check to which you are referring?—A. April 4, 1953. The second check in the sum of \$9,432.50, was received on April 9, 1953, by our Institute and also represented a payment on some aluminum. Now, this bid at that time offered approximately 25,000 pounds of aluminum and the bid would
114 be opened March 25, 1953. Bid forms were prepared by our Purchasing Department and a number of bids were received for this material and the high bid came from United Iron and Metal Company at \$17.15 per one hundred weight, that is, one hundred pounds, and our Purchasing Department awarded the bid to United Iron and Metal Company. But, subsequent to that time, I had communication from the head of the Purchasing Department in which he said he would like to sell all of this smelted aluminum which we had on hand. This memorandum was forwarded to me from Mr. Canfield on April 6, 1953, and states further: "As you know, this bid was awarded to the United Iron and Metal Co. of Albuquerque and since the opening of the bid we have accumulated about 100 thousand pounds of the ingots. I feel that we would be taking advantage of the 'market' and I am sure that the bidder would be willing to accept a greater amount because he plans to load this into a railroad car."

Mr. McLeod: We demand that letter be offered as an exhibit in this case.

Mr. Larrazolo: We would be very glad to do that. (Addressing the witness.) That was approved by the Development Contract Officer?

A. Yes, Commander Gail's approval is on the letter.

115 Mr. Larrazolo: We offer this letter which has been marked Plaintiff's Exhibit 7 into evidence.

Mr. McLeod: No objections.

The Court: Admitted.

Mr. Larrazolo: (Resuming direct examination.) What happened after you received that letter?—A. After I received the letter it was approved by the Navy representative selling the additional aluminum and a check was received,

as noted here, for \$9,432.50, which amounted to 55,000 pounds of aluminum in addition to the 25,000 pounds at \$17.15 per hundred weight. That took care of the additional 55,000 pounds, the total being some 80,000 pounds on those two.

Q. Did you accept this check at the time it came in?—A. Yes, sir.

Q. How many pounds did this represent?—A. That represented 55,000 pounds, that is the \$9,432.50 check.

Q. What was the total of all of it?—A. Eighty thousand pounds. The actual poundage of aluminum on hand was estimated at about 100,000 pounds.

Q. Subsequent to receipt of this check of \$9,432.50, did Mr. Sapir contact you again?—A. He contacted Mr. Canfield and Mr. Canfield contacted me.

Q. What day was that?—A. Sometime after they 116 paid it—let's see, the first of May.

Q. All right, now, when you got this \$9,432.50 check, you accepted this for what reason?—A. As a commitment for payment on an additional 55,000 pounds of aluminum. Then he contacted Mr. Canfield, Mr. Sapir did, and said he did not want the additional 55,000 pounds. A second time, Mr. Sapir was in the office and told me and Mr. Canfield that his customers would not accept the additional aluminum and he stood to lose about \$3,000.

Q. Mr. Sapir told you that?—A. Yes. He demanded that we do something about giving him his money back, since he had agreed only to take the 25,000 pounds. I told him he would have to take that up with Commander Gill or Doctor Workman, since he said he knew he could not possibly receive that much money, which was \$17.15 per hundred weight. We talked it over with Doctor Workman and Commander Gill, and they agreed they would not hold him to this letter and that he would have his money back, since he had agreed only to take the 25,000 pounds per the bid.

Q. Mr. Sweet, when he gave you this check for \$4,287.50, did he take the material, aluminum ingots, from the School?—A. He took them, but I don't know what date. The Invoice shows he took some 26,000 and some pounds, I believe. I have a receipt, attached to Bid Number 23, here, which

states: "I certify that the following material was delivered to United Iron and Metal Company * * * 45,270 gross weight, 18,000 tare weight, 26,300 pounds net weight of aluminum * * * total amount of sale \$4,510.45."

Q. He took that, when?—A. I don't know when.
117 It was right after that, but I don't have the date on that.

Q. The balance of this aluminum represented by the \$9,432.50, what happened to that?—A. That remained on the ground and was never removed. There was some down there on May 1st. After Mr. Sapir made that request of Mr. Canfield and myself, we sent an Invoice to the United Iron and Metal Company, which was dated 4-29-53 and read, "Refund of overpayment on bid purchase of aluminum ingots—amount of deposit \$13,720, amount of award \$4,510.45, which left a net refund of \$9,209.55." The check which was attached here was signed by Mr. John Thurnhoffer as "Partner."

Q. Let me have that bill.—A. Yes, sir.

Q. Now, Mr. Sweet, you state that aluminum on which he made this deposit never left the School of Mines Grounds?—A. No, sir, there is no invoice on it to show it left the grounds at the time of the 26,300 pounds which he certified he received.

118 Mr. Larrazolo: We offer in evidence the Invoice, which has been marked Plaintiff's Exhibit 8.

Mr. McLeod: No objections.

The Court: Admitted.

Mr. Larrazolo: I would like to read this to the Jury, if the Court please. (Counsel reads from Plaintiff's Exhibit 8.) "Invoice, dated 1 May 1953, Vendor's Name—United Iron & Metal Co., P. O. Box No. 1627, Albuquerque, New Mexico; to—New Mexico Institute of Mining and Technology, Socorro, New Mexico; date—4-29-53; Item—Refund of overpayment on bid purchase of aluminum ingots; amount of deposit, \$13,720; amount of award \$4,510.45; net refund, \$9,209.55; Purchase 26,300 pounds net aluminum at \$17.15 per CWT." At the bottom of the Invoice appears the certificate: "I certify that the above bill is correct

and just, and that payment therefor has not been received. United Iron and Metal Company," signed by "John Thurnhoffer, Title, Partner."

(Resuming direct examination.) Now, Mr. Sweet, after that transaction in April, how did you continue to carry those aluminum ingots, which you state Mr. Sapir wanted to buy and then did not buy? How did you continue to carry them upon the records of the School of Mines?

Mr. McLeod: We object to that as not binding on the defendant, however they carried them.

119 The Court: You may answer that.

A. We carried those items as available and for sale.

Q. In whose ownership did you carry them, as School of Mines property or as material of the Government?

Mr. McLeod: Objection.

The Court: I think I will sustain the objection—

Mr. Larrazolo: If the Court please, the reason I am asking this question is because the defense has opened this up by the questions they have asked our witnesses.

The Court: Objection sustained.

Mr. Larrazolo: (Resuming.) Mr. Sweet, did you offer any other items for sale after April of 1953?

A. Yes, sir, we had another sale of aluminum scrap, ingots. The sale bid form was prepared for May 19, 1953, which offered approximately 100,000 pounds of aluminum, which consisted of previous aluminum, plus any additional.

Q. Let me ask you this, whose aluminum were you selling?—A. Contract aluminum, belonging to the Navy Department.

Mr. McLeod: If the Court please, we move that be stricken from the record, as it calls for a conclusion of the witness.

The Court: Overruled.

A. (Witness continuing.) The bid was published and covered approximately 100,000 pounds of aluminum and

about 1,500 pounds of brass, oil radiators. There
120 were a number of bids received again on this invitation opening May 19, 1953, and the bid of the United Iron and Metal Company was again high bid. They were very close; bids ranged from .1579—I have all of them here: “.1137, .1425, .1551, .1577, .1583 per pound.” The bid for .1583, that is about sixteen cents per pound, was awarded to the United Iron and Metal Company.

Q. What was the bid of the United Iron and Metal Company?—A. .1583 cents per pound. So, for the whole 100,000 pounds approximately, which came to about \$15,000, we did, of course, lose some money by refunding the check by the previous bid, because the other was \$17.15 per hundred pounds.

Q. Did you ever get around in the truck to inspect the property of the campus?—A. I drove around, yes.

Q. Did you ever have occasion to see this aluminum which you were advertising for sale here?—A. Yes, sir.

Q. Let me show you Plaintiff's Exhibit 5 and ask you whether you have ever seen any of that aluminum shown in that picture?—A. Yes, sir.

Q. Is that the aluminum offered for sale on May 19, 1953?—A. Yes, sir. The bid was awarded to the United Iron and Metal Company and was made by the Purchasing Department to them on May 25th.

Q. All right. Now, Mr. Sweet, will you look at
121 this document marked Plaintiff's Exhibit 2 here—have you ever seen that before?—A. Yes, sir.

Q. Is that a copy of the bid of Mr. Sapir and acceptance thereon by the School of Mines and the Government?

Mr. McLeod: If the Court please, we move that anything about the Government be stricken.

The Court: The exhibit will speak for itself. I will ask the Jury to disregard any statement made by the District Attorney or by the witness in this respect, and request the Jury to be guided solely on what the exhibit itself shows.

Mr. Larrazolo: (Resuming.) Mr. Sweet, do you have any papers in your files concerning the railroad car weight submitted to you by the Railway Company on the shipments

of this last sale made by the School of Mines?—A. Yes, sir, I do. It says—

Mr. McLeod: We object to that. It would be hearsay.

The Court: Your objection is offered before the witness has attempted to read it.

Mr. Larrazolo: Where did you get these documents, Mr. Sweet?—A. They were in the file of the Purchasing Department.

Q. Are they part of the official records of the 122 School of Mines?—A. Yes, sir.

Mr. Larrazolo: If the Court please, we would like to have all of these documents marked together with one exhibit number.

The Court: They may be given one exhibit number. How many documents are there?

Mr. Larrazolo: One, two, three, four—eight, your Honor.

The Court: All those documents may be included in the same exhibit, have them marked. (Same are marked Plaintiff's Exhibit 9.)

Mr. Larrazolo: Mr. Sweet, you say these represent the School of Mines record of a business transaction with whom?—A. The Invoice is made out by the Purchasing Department and I believe signed by a representative of the United Iron and Metal Company—

Mr. McLeod: Let me see the records. (Counsel receives Plaintiff's Exhibit 9). Here is a weight scale ticket attached to the Invoice, which is an exact copy of the original weight scale ticket, showing 96,580 pounds—

Mr. Larrazolo: This is marked as being an exact copy of the original scale ticket, if the Court please. Perhaps Mr. Sweet could identify the documents for us.

123 The Witness: This first page is the invoice that was submitted to the United Iron and Metal Company on June 17, 1954; this is a receipt for a check—two checks, to be exact—one for \$11,261.12 and one for \$991.75—

The Court: You are saying what it is, but you are not to mention the amount. You may say it is a receipt for checks.

The Witness: (Continuing.) This is a deposit slip, showing receipts of the Institute on that particular day, July 10, 1953; this is a bank statement from the First State Bank of Socorro; this item is a claim submitted by United Iron and Metal Company on June 10th, unsigned; this document shows a cash receipt in the amount of \$1,000—

Mr. Larrazolo: Apparently several of these don't have anything to do with the case—

The Court: Would you remove the ones that don't have anything to do with the case?

Mr. Larrazolo: (Addressing the witness.) What is this bank statement?—A. That just shows a deposit of money.

Mr. Larrazolo: With the Court's permission, we would like the record to show that Plaintiff's Exhibit 9 now contains five pages of documents.

The Court: You have eliminated three?

Mr. Larrazolo: Yes, they have no bearing on the case, so we have eliminated three of them.

124 The Court: Let the record so show. (Addressing the witness.) Did you say, Mr. Witness, that these documents embraced in this exhibit are all part of the records of the School of Mines?—A. Yes, sir.

The Court: Taken by you from those records for use in connection with this case?—A. Yes, sir.

Mr. McLeod: That statement is not quite correct, I believe, because the evidence clearly shows here a weight ticket that clearly is not part of the records of the School of Mines—there is nothing on it to indicate any connection with the School of Mines.

The Court: Have you offered that exhibit, Mr. Larrazolo?

Mr. Larrazolo: Let me see—Mr. Sweet, referring to the Santa Fe Scale Ticket, where did that come from?—A. It

was apparently received from the Santa Fe Railway Company and is needed to support the weight that you bill for the aluminum.

Q. Is it part of the records of the School of Mines?—

A. Yes, it is.

Mr. McLeod: If the Court please, I know of no rule of evidence which allows the introduction of these miscellaneous papers. We don't know how they were placed in the file in order to become part of the evidence.

125 The Court: It is unusual to have these records,

Mr. McLeod, but for purposes of this Court, they have become part of the records of the School of Mines and will be admitted only as records of the School of Mines, and the Jury is instructed that these records are not necessarily true and do not constitute testimony, they are only being admitted to show that it is part of this record of the School of Mines, and their correctness is for the Jury to determine from all of the evidence in this case. Proceed.

Mr. Larrazolo: Mr. Sweet, I hand you Plaintiff's Exhibit 9 and ask you to read the first exhibit there out loud, so the Jury can hear.

The Witness: (Reading from Exhibit 9.) The first page is marked "Invoice No. T-W NOrd-13348, dated June 17, 1953—

Mr. McLeod: If the Court please, we will object to the introduction of that record at this time. The documents were taken out of my hand and I did not have a chance to complete my examination of them.

The Court: You desire to examine them further before they are read to the Jury?

Mr. McLeod: I desire to examine the records, as they were taken out of my hands before I had finished—

Mr. Larrazolo: We will certainly let counsel see them. (Taking Exhibit 9 from the witness and handing same to counsel.)

126 Mr. McLeod: (Examining the exhibit.) I have an objection to this portion of the exhibit which appears to be a duplication of another invoice—

The Court: If you have two of the same kind, remove that one.

Mr. McLeod: I further offer an objection to this part of the exhibit which purports to be a weight receipt from the Santa Fe Railway—that would be hearsay and was not kept in the usual course of business and could not be entered for the record in this case; I further object to the bank slip, which appears to be added mostly for the purpose of keeping these records separate from other records.

Mr. Larrazolo: I would like to have the record show that I have removed the bank slip and also the copy of the invoice.

The Court: Discounting the bank slip and the duplicate invoice, which have been removed, now how many pages do you have?

Mr. Larrazolo: One, two, three, four, five, your Honor.

The Court: You just told us that awhile ago. The exhibit still contains five items?

Mr. Larrazolo: Yes.

The Court: Proceed. Objection overruled.

Mr. McLeod: Let the record show we still object to it.

The Court: Objection overruled.

Mr. Larrazolo: (Addressing the witness.) Explain what that invoice states.

127 The Witness: (Reading.) This first page is an Invoice from the New Mexico Institute of Mining & Technology, Socorro, New Mexico, which reads: "Invoice No. T-W NOrd-13348, date 17 June, 1953, to: United Iron & Metal Company, P. O. Box 1627, Albuquerque, New Mexico; Invoice—Bid No. 53-27, Opened 19 May, 1953, (Sale of smelted aluminum ingots and scraps brass); Smelted Aluminum ingots loaded into RR Car T&NO-54771, Ref: Certified weight slip signed by S. J. Zimmerly, Agent for AT&SF RR. 142,580 Gross wgt. of car, 46,000 Tare wgt., 96,580 lbs. Net weight of aluminum at .1583 per lb. \$15,288.61; Scrap brass oil radiators as weighed by N.M.I.M.T. and witnessed by Mr. B. Saper—2,998 lbs. Net weight of scrap brass at

.1215 per lb., \$364.26; Total amount of sale—\$15,652.87; Less deposit paid with bid—\$3,400.00; Net Amount due—to be Paid by Certified Check:—\$12,252.87; The United Iron and Metal Company hereby acknowledges receipt of the above materials. United Iron & Metal Company, s/ Ben Sapis, (Signature)."

Mr. Larrazolo: Does that state what the weight was of the aluminum that was loaded on that car?—A. That is 142,580 gross weight of car; 46,000 tare weight; 96,580 pounds net weight.

Mr. McLeod: We object to that. He testified he did not know what the weight of that car was.

128 The Court: Overruled. You may proceed.

The Witness: (Continuing.) 96,580 pounds net weight of aluminum at .1583 per pound, making a total cost of \$15,288.61.

Q. Now, Mr. Sweet, let me ask this, does that slip indicate the weight of the aluminum that was shipped from Socorro on that date by the railroad?—A. The weight slip so states.

Q. No, sir, I am talking about this Invoice.—A. It refers to the "certified weight slip signed by S. J. Zimmerly, Agent for AT&SF RR", which is attached to the document.

Q. It gives the weight of the materials that were shipped?—A. 96,580 pounds.

Q. What is the date of that?—A. June 17, 1953.

Q. Does it state the date of delivery or the date it was shipped?—A. No, sir.

Q. Now, is that Invoice signed by anybody?—A. Yes, this is signed for the United Iron & Metal Company by "Ben Sapis" signature.

Q. In other words, Mr. Sapis, the defendant, states on that slip that that amount was shipped, 96,580 pounds of aluminum, out of Socorro, is that correct?—A. Yes, sir. It was loaded on the railroad car and shipped.

Q. State what the next item is?—A. You mean
129 this weight slip? This is a weight slip, Santa Fe Railway weight slip, it reads: (Copy of Scale Ticket) Santa Fe Scale Ticket; Date Weighed, 915p 6-13-53;

Car Weighed Uncoupled at Belen, N. Mex; Initials T&NO; No. 379; Car Number 54771; Gross weight, 142580; Tare weight, 46,000; Net weight, 96580; Date of Tare, Dec., 1949; Capacity of car, 100,000 pounds; Load Limit, 123,000; Signature of Sworn Weighmaster, L. F. Craig. The above is an exact copy of the Original Scale Ticket, dated 6-17-53, s/ S. J. Zimmerly."

Q. Now, Mr. Sweet, that invoice, the first one you were reading from, what is the date on it?—A. June 17th.

Q. What is the date of the shipment from Socorro, tell us from your own knowledge, if you know when it was shipped?—A. It was loaded on the 12th.

Q. The 12th of June?—A. Yes, sir.

Q. You have stated that it was loaded on the 12th of June, 1953, and this invoice is dated June 17, 1953?—A. Yes, sir.

Q. All right, now, Mr. Sweet, did you receive any payment from Mr. Sapir for the 96,580 pounds of railroad weight?—A. (Referring to his papers.) Yes, it is here. We received it, yes sir.

Q. When?—A. That check was drawn—I can quote it from this—

Q. Just answer my question, when did you receive
130 the payment?—A. The payment apparently was received on about June 24th, a check in the sum of \$11,261.12.

Q. On June 24th? What year?—A. 1953.

Q. Now, what was that to pay for, how many pounds of aluminum?—A. That was to pay for this 96,580 pounds—

Q. That is the same amount as the railroad weight?—A. —but that check did not cover that entire weight. I would like to bring that out—there was a second check received for \$991.75 on about the 5th or 6th of July, somewhere around there.

Q. Those two checks cover the entire railroad weight?—A. The entire amount, 96,580 pounds, is covered by the two checks, yes.

Q. Mr. Sweet, how about this, what is the story on this \$991.75 you received in July—what is the situation on that? Do you know the facts there?—A. Well, I was called—

Q. (Interrupting) Mr. Sweet, did you talk to Mr. Sapir about this thing at all?—A. No, sir.

Q. Where did you get that \$991.75?—A. From
131 United Iron and Metal Company.

Q. Where did the sum of \$991.75 come from?—A. It was in the total payment for the aluminum—the 96,580 pounds, and Mr. Canfield advised Mr. Sapir to pay this balance.

Q. Did United Iron and Metal Company write you a letter with that check?—A. On about June 15th a letter was submitted to the School.

Q. Addressed by whom?—A. United Iron and Metal Company.

Q. Did that have any explanation about the \$991.75 check?—A. Yes, it states: (Witness reads from letter.) "The following itemized statement of materials received—payments made therefor, on which there is a total received for materials of \$36,743.25, additional payment totals \$37,735—last payment made, August 8, 1953—" and then lists in the letter an overpayment of \$991.75. This statement is dated June 15, 1953.

Q. Now, Mr. Sweet, let me ask you this: Did you, as Comptroller, in charge of the accounts disallow that credit of the United Iron and Metal Company?—A. I advised Mr. Canfield that we would have to have full payment for the 96,580 pounds of aluminum.

Q. Did you get full payment?—A. Yes, sir. He sent in the check for \$991.75, which made full payment.

Q. And when did you get that check?—A. About
132 the 5th or 6th of July, somewhere in there.

Q. All right, now, Mr. Sweet, do you have any personal knowledge of any unusual activity in connection with the June 12th scale of these aluminum ingots to Mr. Sapir?—A. No, sir.

Q. When was the first time this thing came to your attention?—A. It was first called to my attention on August 3rd.

Q. August 3rd?—A. Yes, sir.

Q. Of 1953?—A. 1953, yes.

Q. How was it called to your attention?—A. Dr. Workman advised me—

Q. Just wait a minute—strike that part of the answer.

Let me ask you this: Did you receive any communication from Mr. Sapir at your office at the School of Mines around July 29th or thereabouts?—A. A letter dated July 30th was received.

Q. From whom?—A. United Iron & Metal Company.

Q. Who signed it?—A. John Thurnhoffer.

Q. Does it give his title?—A. No, sir, but apparently he is listed as a partner on the invitation.

133 Q. Was anything inclosed with that letter?—A. A check.

Q. And what was that?

The Court: (Interrupting) Mr. Witness, looking at that letter, how did you make your calculations in determining the amount due?—A. You take the net weight, and the aluminum is so much per pound.

The Court: Did you make your calculations before you got the checks from Mr. Sapir?—A. Yes. I attached to the Invoice the weight scale ticket which showed it was weighed at Belen, and showed the net amount it weighed on the car.

The Court: Is that the way you made all your calculations?—A. We had to in the case of aluminum, because it is loaded on freight cars.

The Court: That weight scale ticket that you made your calculations from, is a part of your regular file?—A. Yes, sir. It is attached as a part of the document, because this is to support the charge appearing on the document.

The Court: And you keep it as part of your own records?—A. Records of the comptroller, yes.

134 The Court: Thank you. You may proceed.

Mr. Larrazolo: Mr. Sweet, I have here what has been marked Plaintiff's Exhibit 10, which is that letter you just talked about, and—

The Court: Are you offering that letter in evidence, Mr. Larrazolo?—A. Yes, sir, to reestablish the record.

The Court: Counsel have any objection?

Mr. McLeod: No objection.

The Court: Admitted.

Mr. Larrazolo: (Resuming) Mr. Sweet, give the date of the letter, who signed it, and the contents of it—please read all that to the Court and the Jury.

The Witness: (Reading) "United Iron and Metal Company, Albuquerque, New Mexico, dated: July 30, 1953; addressed to: New Mexico Institute of Mining and Technology, Campus Station, Socorro, New Mexico, Attention: Mr. Canfield, Purchasing Agent. Gentlemen: We enclose Cashier's check No. A76180, in the amount of \$2,216.20, in payment of 14,000 pounds of aluminum ingots at \$.1583 per lb., awarded us under bid No. 53-27, Opened May 1953. (Paragraph) This represents the load that was hauled to Albuquerque by truck, and was not included in your statement dated June 17, 1953. Very truly, (signed) John Thurnhoffer."

Q. Did they inclose a check?—A. Yes, sir.

135 Q. What was the amount of the check?—A. \$2,216.20.

Q. Now, Mr. Sweet, is this payment that he mentions here, the payment on which delivery was made on June 12, 1953?—A. Yes, sir.

Q. And he sent the check on July 30, 1953?—A. Yes, sir.

Q. Now, what did you do with the check you received, Mr. Sweet?—A. Held it in the safe or the vault of the Institute.

Q. Did you cash it?—A. No, sir.

Q. Why didn't you cash it?

Mr. McLeod: We object to why he did not cash it.

The Court: Sustained.

Q. What did you finally do with that check?—A. The check was returned to the United Iron & Metal Company.

Q. On what date did you return it?—A. I don't have that letter here with me—oh yes, here it is. (Witness searches through his papers.) This is a letter dated October 15, 1953, the date the check was returned.

Q. Let me have that—

Mr. McLeod: You are not trying to introduce that let-

ter into evidence? If the Court please, we would like to have that letter read in the absence of the Jury.

136 The Court: I see no occasion for that. When counsel offers it, make your objections and I will rule on it. I might say, Mr. Larrazolo, that it appears the letter was written subsequent to return of indictment in this case and it would be highly prejudicial, I surmise.

Mr. Larrazolo: You never did cash that check, did you?
—A. No, sir.

Mr. Larrazolo: That's all.

Cross Examination by Mr. McLeod.

Q. Mr. Sweet, how long have you been connected with the School of Mines?—A. Since 1946.

Q. In what capacity, sir?—A. Originally with the Research Development Division, on the Staff of Medical Services, and Assistant to the Director.

Q. Now you are Comptroller there?—A. Yes, sir.

Q. That puts you in charge of the business end of the School of Mines, does it?—A. Yes, sir.

Q. Directing your attention to what has been identified as Plaintiff's Exhibit 7, which is a Memorandum from Canfield to Sweet, that is where Canfield asked you, back
137 in April of this year, to allow him to sell approximately 100,000 pounds of aluminum, above the 25,000 pounds that Mr. Sapir had already entered a bid for, is that correct?—A. No.

Q. That's not it? Then what was that?—A. It states: "—we have accumulated about 100 thousand pounds of the ingots—" which included the 25,000 pounds.

Q. And Mr. Sapir at no time ever saw this communication, did he?—A. No, sir.

Q. Then this approval on here by the Development Contract Officer was for you there at the School of Mines?—A. Yes, sir.

Q. Now, Mr. Sweet, you, as business manager of the School of Mines, knew generally what was going on at the business office, didn't you, during the course of your duties?—A. Yes, sir.

Q. There was a bid known as Bid Number 23 in which the School of Mines offered to sell 25,000 pounds of alumi-

num, published in the Albuquerque Journal in March of 1953, this year, is that correct?—A. Yes, sir.

Q. There was nothing in here that said anything
138 about this 25,000 pounds of aluminum being any property of the Government, was there?—A. Our Institute is a State Agency of the State Government.

Q. I am talking about the United States Government.

The Court: I believe counsel understands the connection.

Q. Now, Mr. Sweet, this 100,000 pounds of aluminum, it was including the 25,000 pounds that was finally disposed of on Bid Number 23, wasn't it?—A. Bid Number 27.

Q. All right, then you had about 55,000 pounds of aluminum that was not offered on Bid 23?—A. Bid 23 offered 25,000 pounds.

Q. 25,000, and you had about 55,000 pounds more?—A. 80,000 was the total, yes, sir.

Q. Why wasn't that 55,000 pounds offered on that bid?—A. At the time the bid was put out, that was about all we had on hand.

Q. This other stuff was smelted after that?—A. Yes, sir.

Q. After the Sapir bid had been accepted on Bid No. 23, then arrangements were made with him, or with United Iron & Metal Company, and he bought from you the other 55,000 pounds of aluminum, didn't he?—A. Yes, he sent a check for the 55,000 pounds.

Q. And you cashed that check and placed that
139 check in the general account of the School of Mines, didn't you?—A. Yes, sir, it was deposited in the Comptroller's account.

Q. And you kept that money in that account for how long? Look at the record and tell us.—A. Well, let's see—that was returned May 1st.

Q. When had he paid you?—A. The date of the check, I don't have here—it was a \$9,000 check—let's see, the check for \$9,432.50 was dated April 8th and presumably sent right after that.

Q. He paid you on April 8th and you held the check until May 1st, is that correct?—A. Right.

Q. And you then refunded to him some \$9,200, didn't you?—A. Yes, sir, \$9,209.55.

Q. Now, Mr. Sapir had bought 25,000 pounds, or his Company had bought it, on Bid Number 23, hadn't he?—A. Yes, sir. The actual total delivery was 26,300 pounds.

Q. In other words, he took fifteen hundred pounds more than he bid for?—A. Thirteen hundred pounds.

Q. He paid for that, didn't he?—A. Right.

Q. And you refunded him some money?—A. Right.

Q. And he was at all times claiming that the actual cash owed him was \$991.75?—A. Not at all times, it was sometime after he decided to purchase this additional poundage.

Q. After he decided to purchase the additional 100,000 pounds?—A. 55,000.

Q. And, as a matter of fact, it was on this last transaction on Bid Number 27 that he deducted the \$991.75?—A. I didn't have anything to do with that.

Q. But that is when he deducted it?—A. Yes, sir.

Q. You demanded that he pay for all of that, didn't you?—A. Yes.

Q. He did pay you, didn't he?—A. Yes.

Q. This 26,300 pounds of aluminum, do you know how that was weighed?—A. There is a weight slip in the folder here.

Q. Where did it come from?—A. From the Purchasing Department.

Q. So, actually you do have some scales at your place where you could weigh the aluminum, since you weighed some twenty-six thousand pounds?—A. It doesn't say where it was weighed.

Q. You got that slip, didn't you?—A. The weight slip is here.

Q. It wasn't shipped by railroad?—A. No, sir.

141 Q. Was the Bid on Number 27 advertised?—A. Yes, sir.

Q. And what paper was it advertised in?—A. Albuquerque Publishing Company.

Q. (Indicating paper in witness' hand.) You have a copy of it there, is that for the original Bid 27?—A. Yes, sir.

Q. All right, let me have it please. (Witness hands paper

to counsel.) Now, you say that Mr. Sapir on Bid 27 paid you how many times? Look at your record and tell us exactly how many times he paid you.—A. He paid \$12,252.87.

Q. Plus \$991.75?—A. No, sir.

Q. That is the total?—A. Yes, \$12,252.87, plus \$3,400 which was deposit paid, making a total of \$15,652.87, that he paid.

Q. For 96,850 pounds of aluminum, the bid offered by Mr. Sapir came to that amount of money?—A. 96,580 pounds of aluminum at .1583 per pound came to \$15,288.61.

Q. How do you figure that?—A. He also got 2,998 pounds of scrap brass at .1215 per pound, which came to \$364.26.

Q. He paid you for the aluminum scrap, plus the 142 brass?—A. Yes, the whole amount of the sale was \$15,652.87.

Q. Mr. Sweet, I hand you what has been marked for identification Defendant's Exhibit G, which purports to be a notice published in the newspaper, Albuquerque Journal, during the Month of May, 1953— —A. Yes, sir.

Q. State what that is?—A. Notice of bid.

Q. Mr. Sweet, I would like you to read that over very carefully—will you please read this? (Counsel hands notice of publication to witness.) Now, you were looking at Defendant's Exhibit G, did you find anything at all in there, was any mention made of the United States Government?—A. No, sir.

Q. Navy?—A. No, sir.

Q. Military?—A. No, sir.

Q. No mention of anybody except the School of Mines?—A. It mentions or states that the Purchasing Agent of the New Mexico Institute of Mining and Technology at Socorro, New Mexico, is offering this aluminum and brass for sale.

Mr. McLeod: I offer this in evidence, your Honor.

The Court: Any objections?

143 Mr. Larrazolo: No objections.

The Court: Let it be admitted.

Mr. McLeod: (Resuming) That last exhibit was on Bid Number 27, was it not?—A. Yes.

Q. Now, I show you what purports to be a page taken from the Albuquerque Journal, page twenty-seven to the issue dated September 22, 1953, and call your attention to that part under the heading "Legal Notices" which has a pencil mark around it and ask you to tell the Court and Jury what that is, if you know?—A. It is an advertisement for bid—shall I read it?

Q. Yes.—A. "The Purchasing Dept. of the N. M. Institute of Mining & Technology, Socorro, N. M. is calling for bids on surplus Government owned equipment. Bids may be obtained by contacting the Purchasing Dept., N. M. I. M. T., Socorro, N. M. Telephone 588, Bid No. 6. Opening to be at 10:00, October 7, 1953." I can't explain why it was worded that way—

Q. Now, this is after these Bids Numbers 23 and 27, isn't it?—A. Yes, sir.

Q. That bid does refer to it as being Government equipment?—A. This is equipment other than scrap and salvage.

Q. Is that the reason for it, Mr. Sweet?—A. I have considerable documents that would explain—(Examining his brief case.) I don't have them with me—

144 The Court: Answer the question without getting out any documents.

A. I think so. As I recall, the dates of both these other bids were earlier. The invitations are prepared by the Purchasing Department and forwarded to the newspaper. I don't remember exactly—

The Court: (Interrupting) Gentlemen, it is getting so late! I had not wanted to hold a night session, but we are taking so much time that we had better recess at this time.

Mr. McLeod: I have only about three other questions to ask this witness—

The Court: Court will be in recess until seven-thirty this evening.

Q. Mr. Sweet, I believe I had asked you about this advertisement in the Albuquerque Journal for bids on Government owned equipment, is that correct?—A. Yes, sir.

Q. You did read that portion of the paper, that
145 ad, is that correct?—A. Yes, sir. I was explaining
that ad was run for equipment and not for scrap
aluminum or anything like that. I did want to say how that
was done there in the Purchasing Department of the School.
They prepare the ads there and they read something like
this in some cases where they want bids on excess Govern-
ment property. When it was scrap or salvage, I don't think
they cared to show it was Government property—

Q. Now, take your time. Turn back to that, please, to
that yellow sheet you had there, Mr. Sweet. (Counsel refers
to unidentified paper in witness' hand.)—A. When that bid
was originally prepared, nothing was said about Govern-
ment property, but excess property was inferred to be
Government property.

Q. I am not asking you that— —A. No, sir—

Q. Referring again to Defendant's Exhibit G, nothing
was said about Government property in that?—A. No, sir.

Mr. McLeod: I would like to show the Jury this news-
paper (the same having been marked Defendant's Exhibit
H for identification) and offer it in evidence, your Honor.

The Court: It is admitted.

Q. Now, directing your attention to the last item
146 or last paper of Plaintiff's Exhibit 9, you show a
check for \$12,261.12— —A. Eleven thousand—

Q. \$11,261.12?—A. Yes, sir.

Q. Received from United Iron & Metal, the sum was
written over, is that correct?—A. No, it was a strike-over
on the typewriter.

Q. Then it shows one for \$991.75?—A. Right.

Q. That was the total paid for aluminum ingots and
brass radiators? That total amount included brass radia-
tors?—A. Yes.

Q. There is a total shown of \$3,400 paid down?—A.
That's what I testified earlier.

Q. Now, these two checks we have here: one for \$9,-
432.50, and the other one for \$4,287.50, dated April 4 and
8, 1953—you received those in April didn't you?—A. Yes,
sir.

Q. And you kept the \$9,209.55 out of this amount of

money until sometime up into the 30th of May?—A. April 29th, yes, sir.

Q. Now, this first bid—Bid Number 23, is the correct number, isn't it?—A. Yes, sir.

Q. That was what you call a "where is, as is" bid, wasn't it?—A. Let me see the original copy of the bid—I guess this is it here—it says "F.O.B. New Mexico Institute of Mining and Technology, Campus Station, Socorro, New Mexico."

Q. That means it is a "where is, as is" bid, isn't it?

Mr. Larrazolo: If the Court please, counsel should define that term for the benefit of the Jury, as they probably have no idea—

Mr. McLeod: (Interrupting) Mr. Sweet, these bids for scrap metal were, as stated in the ad, to be at a certain place?—A. Yes, sir.

Q. And it was your duty to come and get it, if you were the successful bidder, within so many days?—A. Yes, sir.

Q. And that is what is known as a "where is, as is" Bid?—A. You might use the expression, I think.

Q. You have heard it before?—A. Yes, sir. It was F.O.B. Socorro and I presume that is what that is.

Q. I call your attention to Defendant's Exhibit B, in that letter the bidder, United Iron & Metal Company, was told to come and pick up the material on Bid No. 23, wasn't he?—A. On Bid No. 27, sir.

Q. That was Bid No. 27?—A. Yes.

Q. They were told to come and pick that up, weren't they?—A. Yes, sir.

Q. That was a "where is, as is" bid?—A. Well, it says here—may I read it? "In accordance with the bid—"

Q. It has already been read to the Jury and we don't need to read it now. I show you what has been marked for identification as Defendant's Exhibit I and ask you to state what that is, if you know.—A. Yes, this is the refund of overpayment on Bid Number 23, which I previously described, in the sum of \$9,209.55.

Mr. McLeod: At this time, we offer into evidence Defendant's Exhibit I.

Mr. Larrazolo: No objection.

The Court: Admitted.

Mr. McLeod: (Resuming) Directing your attention again to Defendant's Exhibit I, this was a voucher, Purchase Voucher, sent out to the United Iron & Metal Company, to be signed and returned to you so that they would get back \$9,209.55, was it?—A. A certified voucher, yes.

Q. Check that over, Mr. Sweet, and tell me, is there anything in the wording that says "Government or any indication that it has anything to do with it?—A. Well, the T-W, of course, is attached to that contract.

149 The Court: I don't understand, what has the document T-W to do with that contract?

Mr. McLeod: That is all it says here on the voucher, "610-10 'T-W'" Mr. Sweet, would Mr. Sapir or even A. H. McLeod just by looking at those initials know that was Government connected? Would this voucher convey that to them?—A. No, nothing, except that it was a refund payment.

Q. Now, regarding this Cashier's Check for \$2,216.20 that you received— —A. Yes, sir.

Q. When did you receive it?—A. It would say on one of the exhibits here—

Q. Just to refresh your recollection as to when you received it, I hand you Plaintiff's Exhibit 10.—A. It must have been about July 30th.

Q. Of this year?—A. 1953.

Q. Well, you say you returned that last week?—A. On October 15th.

Q. October 15, 1953, you returned it at that time? That was a Cashier's check, was it not?—A. Yes, sir.

Q. And you held it until then?—A. Yes.

Q. The check was made payable to you?—A. To
150 the New Mexico Institute of Mining and Technology.

Q. Payable to the New Mexico School of Mines?
—A. Yes, sir.

Q. It wasn't payable to the Government, was it?—A. No, sir.

Q. Now, from the time you received Mr. Sapir's check, or the check of the United Iron and Metal Company, of \$9,432.50, back in April 8, 1953, which is reflected in De-

fendant's Exhibit D, from that time until the latter part of April, Mr. Sapir could have come on your property, could have weighed out these ingots of aluminum, and removed them at any time he wanted to, couldn't he?—A. He had already expressed the desire prior to that time that he did not want them, but he could have changed his mind and he could have had them, yes.

Mr. McLeod: That's all.

Redirect Examination by Mr. Larrazolo.

Q. Mr. Sweet, in response to defense counsel's question, you testified you sent back the check for \$2,216.20 to Mr. Sapir on October 19, 1953, is that correct?—A. I think there is a document showing it was the 15th that I sent it, I believe.

Q. October 15, 1953?—A. Yes, sir.

Q. Did you send a letter to him in returning that check?—A. Yes, sir.

151 Mr. Larrazolo: At this time, we again offer in evidence the letter sent by the School of Mines to Mr. Sapir on October 15, 1953.

The Court: Have it marked as an exhibit.

Mr. Larrazolo: I offer in evidence Plaintiff's Exhibit 11.

Mr. McLeod: To which we object on the same grounds as heretofore made and on the further ground that it would be prejudicial to the defendant, as it is something that happened several months after the indictment in this case was made.

The Court: I will look at it. (Counsel hands Plaintiff's Exhibit 11 to the Court.) Go ahead.

Mr. Larrazolo: (Resuming) Now, Mr. Sweet, was the School of Mines at any time after that—after those aluminum ingots were brought to Albuquerque by Mr. Sapir, was the School of Mines at any time after that until today ever given an opportunity by Mr. Sapir to weigh that aluminum to determine what the amount of aluminum was that he brought here?—A. No, sir.

Q. Did the School of Mines request that opportunity?—
A. Yes, sir.

Q. Now, Mr. Sweet, on October—July 30, 1953, you testified as shown by Plaintiff's Exhibit 10 that Mr. Sapir returned to you, or rather, sent you a check in the
152 amount of \$2,216.20, in payment of the aluminum he had here in Albuquerque, is that correct?—A. Yes, sir.

Q. Did he, when he paid for the original aluminum on the railroad, ever pay for this allotment of aluminum that he brought to Albuquerque?—A. No. That was paid about thirty days later—a month later.

Q. Did he explain to you why he waited that long in paying for it?—A. No, sir.

Q. He did not give you an opportunity to even weigh it to see if it was correct?—A. No, sir.

The Court: Don't repeat, Mr. Larrazolo.

Mr. Larrazolo: That's all.

The Court: The witness may go. Call your next witness.

153 D. ARTHUR BURNS, testified as follows:

Direct Examination by Mr. Larrazolo.

Q. State your name, please, sir.—A. D. Arthur Burns, Jr.

Q. What is your official capacity?—A. Special Agent with the Federal Bureau of Investigation.

Q. You are stationed now here in Albuquerque?—A. I am.

Q. Were you stationed in Albuquerque already on June 12, 1953?—A. I was.

Q. Did you have occasion to investigate matters pertaining to the disposition of property at the Socorro School of Mines during the month of July, 1953?—A. June and July, yes, sir.

Q. What type of property was it you were looking into, Mr. Burns?—A. Aluminum ingots.

Q. Why was it that you were looking into the disposition of this property?—A. There was an allegation that some

of these aluminum ingots were stolen possibly. That is the allegation which was made.

Mr. McLeod: Your Honor, we object.

154 The Court: I want the Jury not to consider the last statement made by the witness.

Q. Will you state, Mr. Burns, just what actions you took when this matter was referred to you?—A. I was in Socorro at the time when I received a communication from our office—

The Court: (Interrupting) Don't state the communication. Just what action did you take?

A. I interviewed, first of all, Dr. Workman, and followed that by interviews with Mr. Kempton, Mr. Heathcock, and Mr. Ely, there in Socorro.

Q. Without referring to what they stated to you in any of your conversations with those gentlemen, what was the nature of the investigation that you made there?

The Court: The nature of it would be rather misleading. What did you do? Don't repeat conversations.

A. I investigated the allegations made to me on that complaint. In other words, I made inquiries.

The Court: Members of the Jury, disregard entirely what the witness said about complaints or allegations made to him. You are not to consider that for any purpose whatever in this case.

Q. Mr. Burns, tell this Court and Jury about the investigation that you made with reference to the defendant, Ben Sapis.—A. On July 29th, I had occasion to interview Mr. Sapis in Albuquerque. Mr. Diley, a fellow Agent, and I went to his place of business on July 29, 1953, and we first interviewed his partner as to who helped to load—

155 Mr. McLeod: We object to what was said to the partner, unless the defendant himself was present.

A. When Mr. Sapis came down, I first met him in the company of this fellow Agent, Mr. Diley, at his place of business, at the time I had interviewed two men pertaining to his cars, and he asked me why I was in his place of

business. I told him I was investigating the circumstances surrounding the aluminum ingots from the New Mexico School of Mines and their being brought to Albuquerque. He asked our interest in the case and I said it was Government property. Mr. Sapir then said—

Mr. McLeod: If the Court please, we would object to anything that Mr. Sapir said in connection with this case, if it was having to do with any crime that might be charged here, because anything said by him cannot be used until such time as the corpus delicti has been proven.

The Court: Overruled. Anything in the nature of a confession or anything like that, you must make proper qualification.

A. He asked our interest in the case and I told him Government property was involved on a certain truck load. He said, "I remember the deal. It is a closed case, is it not?" And I told him we were looking around to see if everything was all right and he said, "What's wrong?" I said to him that it appeared a truck load of aluminum ingots had come to Albuquerque unlawfully. He said, "Aluminum ingots?"

156 Mr. McLeod: We object.

The Court: Overruled.

A. "The last truck of aluminum ingots are in my warehouse in the West part of Albuquerque at the present time, is anything wrong?" I said, "I am not certain. I don't know at this time, but the School wants me to investigate." He said, "All of our stuff is paid for or will be." I again said, "We don't know. I am here to make inquiries." We went to his office and he said at this time that he had an agreement with Mr. Canfield, an oral agreement, that the last truck load consisting of 350 ingots, weighing forty pounds apiece, making a total of 14,000 pounds, that Mr. Canfield was going to bill him on these. Three truck loads had gone into the railroad car and the fourth was to be added to the bill, which he received, and he thought it was a closed case. He kept asking what was the trouble, what was the complaint. I asked him to show me the invoice and he located the invoice from the School of Mines. The

invoice listed the aluminum ingots that were put on the freight car and billed to him. It listed also some brass radiators. Mr. Sapir said he never saw this invoice before. It was not signed by anybody, it was a copy of an invoice. I read the invoice with Mr. Sapir in the office. It mentioned that the aluminum ingots were put on the train, with the gross weight of the car, the tare weight, and the net weight of the aluminum, amounting to 96,000 and some odd pounds.

Q. The net weight of the contents of the railroad
157 car was 96,000 and some odd pounds?—A. Correct.

We looked at it and I said, "There is no truck load weight on this invoice. There is no weight other than the railroad weight on this invoice." He said, "I will take care of it immediately. I will send them a check and that will close the deal." I said, "I am here to investigate the case. I am to see what happened in this case." We went over the details and I told Mr. Sapir I would like to take a statement from him. I told him of his rights and he said he did not wish to make a statement. During this morning, he asked me if I had talked with Mr. Canfield. After I left Mr. Sapir—shall I continue on from here?

Q. Was this still on July 29, 1953?—A. The same date, yes. Later in the day, Mr. Diley and I came back and asked to see the aluminum ingots. He said, "I will be very glad to take you over there." He showed us the ingots in the warehouse, which consisted of bars stacked about chest high, in size they were roughly eighteen inches long and ten inches wide.

Q. Did you see those ingots?—A. I did.

158 Q. I show you what has been marked Plaintiff's Exhibit 5 and ask you to state whether the aluminum ingots you saw looked like those in that picture?—A. They did, sir. (Witness examines exhibit.) They looked like these here.

Q. The same type of metal?—A. As far as I can tell from a photograph, they looked like that, yes.

Q. You may continue.—A. I asked Mr. Sapir then, upon seeing these ingots, how soon he intended to dispose of them. He asked me, "Why?" and I said, "If you intend to dispose of them immediately, I will ask Mr. Diley to stay

here and I will call the attorney immediately to take action concerning this property—

Mr. McLeod: We object to the witness continuing to testify in the way he is testifying. This is his version his interpretation of the situation and this man is a Government Agent. At this time we offer objection.

The Court: Overruled. Proceed.

A. I asked what he intended to do with the aluminum ingots and he asked, "Why?" Like I say, I mentioned if he intended to get rid of them quickly, I intended to act quicker. I would see if the attorney would like to have him keep them and I mentioned, "It is up to you. I am just asking what you intend to do with them." He said, "I have a deal cooking, but I will leave them here if you wish." And I said, "I will give that information to the United States Attorney."

159 Mr. McLeod: Let the record show that our objections go to all this line of testimony.

The Court: Overruled. Proceed.

A. He said he would keep the ingots there until he heard from me and I said, "Please don't put it that way. We are just investigators, we can't make that decision. The United States Attorney will make disposition in that regard. Keep them until you hear from the U. S. Attorney."

Q. Who was present with you at this time?—A. Mr. Phillip Diley, a fellow Agent. I left him and proceeded with my work.

Q. Going back to the time you say you saw the aluminum ingots in the warehouse, just how were they being kept there?—A. After we entered the warehouse, in about the center they were piled up chest high and about ten feet of them was almost covered with rags and bits of rags laying around just loose on the ingots.

Q. Would you be able to see the aluminum ingots if you had looked in there, without removing the rags?—A. As the warehouse was dark at the time, there are not any windows in it on that side, they would be hard to see, if you didn't know where to look for them.

Q. What did you do after that?—A. I then proceeded down to Socorro to further work on this case.

Q. Now, after you went to Socorro, did you talk to Mr. Sapir again?—A. On July 31st.

Q. Where did you talk to him?—A. In the F.B.I. Office in Albuquerque.

Q. Now, what happened there? What was the nature of your conversation with him then?—A. Because of the investigation in Socorro, I asked Mr. Sapir by phone if I could see him in the office to further discuss the case. He said he would be right over and then he came over. I said what I had learned in Socorro—

The Court: Don't tell us what you told him. Confine it to what you said and what he said. I am not quite sure you are doing that.

A. I told Mr. Sapir that I had talked with Mr. Canfield in Socorro and Mr. Canfield said there was no such agreement as to the weight of the aluminum ingots on the last truck load; no such agreement as to some of the ingots; no such agreement that he would bill them. He said that Mr. Canfield was lying, that there was an agreement as to the last truck load. He said, "I don't know how I can prove it, but I know that Mr. Canfield knows they did come to Albuquerque." Then he said, "I know how to prove it. I can find that certain gasoline station in the North part of Socorro, where the truck—"

161 Mr. McLeod: Objection to this on the ground this is an incompetent witness.

The Court: Overruled.

Mr. McLeod: Exception.

A. I didn't know what the story was at this time in the case, there were two conflicting statements—

The Court: (Interrupting.) Confine yourself to what you said and what he said.

A. I mentioned that to him: "There are conflicting statements by your statements and Mr. Canfield's statements." I told him what I had learned in Socorro, that Mr. Canfield said there was no such agreement, and

he said there was an agreement. He told me that Mr. Canfield was lying. I said, "How can I ascertain that Mr. Canfield knows the truck load came to Albuquerque?" He said, "I can take you to the filling station in Socorro, where I saw the helpers who filled the truck load and Mr. Canfield. They were there some time after six o'clock, or sometime after the last truck load was driven down there. Mr. Canfield would never let a truck load come to Albuquerque without his knowledge." He said, "I will help to prove it at Socorro. I will go there with you." Mr. Sapir and I did go to Socorro on the 31st of July, and I told him, "It would be good if you stay in the background, while I talk to the service station people."

Q. Did Mr. Sapir and you have any conversation
162 on the way down to Socorro?—A. We talked, yes.

Q. What did he have to say on the way down?—A. He merely talked about his innocence in this case to the effect that he didn't have to steal—he had a business and a family, that he was innocent in this case of any wrong doing.

Q. Were you still trying to get a statement from him?
—A. Not at that time. I tried to on the 29th of July in Albuquerque. When we got to the gasoline station, he stood about ten feet from me while I asked two men if they had noticed a semi-trailer—

The Court: (Interrupting.) Was this in the presence of the Defendant Sapir?

A. I don't know if he could hear all the conversation, sir. He came right after me there at the gasoline station in Socorro. I went to the two men at the station and discussed his being there, Mr. Sapir being there, several weeks prior with a big semi-truck carrying a load of aluminum ingots. One man knew Mr. Canfield by name, and remembered Mr. Canfield as the man he had seen and both stated they saw the truck.

163 Mr. McLeod: Objection to that.

The Court: Overruled. This was in the presence of the defendant.

A. While in Mr. Sapir's presence he stated that he recognized or remembered the semi-truck of metal being in the station several weeks ago with "that man" and he pointed to Mr. Sapir "in that car."

Q. By the way, who is Mr. Sapir? Is he here now? Point him out please. (Witness points to the defendant.)

The Court: Don't interrupt.

A. They placed him, so far as I was concerned, in his presence.

Mr. McLeod: We object to his concern, your Honor.

A. (Continuing.) I talked to these two gasoline station men, with Mr. Sapir there, and one person stated that Mr. Canfield had been there with the aluminum, or with metal of some type, in the truck, which went North. Later on that same evening, July 31st, at the School of Mines in the Conference Room I had occasion to talk with Mr. Sapir. He came into our Conference Room, at my invitation, and I told him there has been an accusation made against him involving this stolen aluminum from the Government. In this connection, I told him he did not have to make a statement. I told him of his rights concerning statements to the F.B.I., and that they had authority to place him under oath in a case of this type. Then I asked him what he had to say about this particular allegation, to the effect—

164 Mr. McLeod: We object to placing him under oath.

The Court: Sustained.

Q. Mr. Sapir, did he give you a statement then?—A. No, sir, he said he did not wish to give a statement.

Q. You told him then the accusations made against him regarding stolen articles from the Government?—A. I did.

Q. Did you tell him who made the accusations?—A. Yes.

Q. Who did you tell him?

Mr. McLeod: We object.

The Court: It is not material. Sustained.

Q. Subsequent to that, did you make any further investigation of this case after that time?—A. Yes, I made inquiries after that.

Q. And did you happen to talk to Mr. Sapir in connection with the case?—A. I had no further conversation with Mr. Sapir after July 31st. I haven't seen him since then, except today.

Q. Not until today? When you were talking to Mr. Sapir the first time about the aluminum ingots which he had in his warehouse, which he showed you, did he explain to you why he had not paid for those aluminum ingots, or was that matter brought up at all?—A. He stated he was waiting for a bill from Mr. Canfield. He first stated
165 he thought everything was paid for, but when he saw the invoice, the one he saw in my presence, and that the railroad weights only were on the invoice, he said at that time that he would immediately send a check. He said that he had not sent a check previously because he was waiting for a bill from the School of Mines in Socorro.

Q. At first, he did think they were paid for, is that right?—A. He thought the thing was closed. He thought the deal was completely closed and asked what the trouble was.

Q. After that, he said he was waiting for a bill?—A. Correct.

Mr. Larrazolo: That's all.

Cross-Examination by Mr. McLeod.

Q. Did Mr. Sapir tell you that his partner, Johnny Thurnhoffer, had charge of the invoices and bookkeeping?

—A. His partner, Johnny, took care of the books and the paper work, yes, sir.

Q. He told you that day, did he, Mr. Burns?—A. Yes.

Q. How long have you been with the F.B.I.?—A. Sixteen years.

Q. How long have you been in Albuquerque?—A. Six and a half years.

Q. Now, a few minutes ago, you tried to give us
166 all the impression that Mr. Sapir did not want you to know about these ingots, is that right?—A. That is not correct.

Q. Didn't you say they were almost all covered with rags?—A. Correct.

Q. And when Mr. Larrazolo asked you, you said it was dark in the warehouse?—A. It was much darker than outside, of course.

Q. When you first went over there and talked to Mr. Sapir, he told you he had the aluminum ingots?—A. Correct.

Q. You didn't ask to see them at that time, did you?—A. Yes.

Q. Not at that time?—A. Not immediately.

Q. Later, when you came back again that same day?—A. Correct.

Q. You said, "Mr. Sapir, I want to see those ingots"?—A. Correct.

Q. And he said, "Come on, I will show them to you." didn't he?—A. Correct.

Q. Did he take you in his car?—A. We went in our car.

Q. Did he go in the car with you?—A. Right.

Q. He went over there and showed them to you?
167 —A. Correct.

Q. "Here they are," he said, "look at them"?—A. Correct.

Q. At no time did he ever try to hide them from you?—A. Correct.

Q. You say it was dark, just because of the way the warehouse was built?—A. As far as I was concerned, that is correct.

Q. You tried to give us all the impression that he was deceiving you, didn't you?—A. Well, the aluminum ingots were covered with rags.

Q. Part of them were not covered with rags?—A. That's right, part of them were not covered with rags.

Q. You looked at them, and even with the rags on them, if you looked at them and knew anything about metals, you would know what it was, wouldn't you?—A. I did assume it was metal, yes.

Q. If you had looked at it in a better light you would have seen it?—A. I believe so.

Q. When you talked about the thing being covered up,

parts of them could be seen as it was, couldn't they?—A. Right, if you were looking for them, yes.

Q. Were they out in the open?—A. Against the wall.
168

Q. You were taken right in there by him and they were pointed out to you?—A. Correct.

Q. And he told you, when you first talked to him, that he thought it was a closed deal, is that correct?—A. That's correct.

Q. When you asked him to let you see the invoice, he did get the invoice for you?—A. Mr. Thurnhoffer found the invoice.

Q. You all examined it?—A. Correct.

Q. When you looked at the invoice and called attention to the fact that only the railroad car weight was listed and it said nothing about a truck load, he said, "Very well, we will send a check," didn't he?—A. Correct.

Q. He told you that right then and there, didn't he?—A. Correct.

Q. You hadn't seen him before that day, had you?—A. Not to my knowledge.

Q. He comes in and tells you he thought it was a closed deal and asks you what is your interest in the case?—A. Correct.

Q. Then, he says, "Let's go to Socorro;" it was at his invitation that you went there?

Mr. Larrazolo: If the Court please, we object to counsel's asking two questions to one answer. I think he is
169 asking too many questions at a time.

The Court: I think he does give an answer to each question. If you don't understand, let us know. Hereafter, counsel, if you should ask two questions, take out one!

Q. The day you went over there to Socorro, he said he thought it was a closed deal?—A. That was one of his first statements in his office that day.

Q. He said he would get hold of Johnny and look at the invoice?—A. He didn't say there was an invoice, but I asked for it.

Q. And Johnny got the invoice, didn't he?—A. He did find the paper.

Q. Johnny found the paper and the three of you examined it?—A. Correct.

Q. You yourself pointed out to him that there was no mention of the truck load of ingots?—A. Correct.

Q. It did say about a railroad car on there?—A. It mentioned weights, that's right.

Q. He said he was immediately going to take care of the matter, didn't he?—A. He said he would send a check to cover the truck load, which he owed, to consist of 14,000 pounds, per the agreement with Canfield.

Q. That was the first time you had ever seen this man?—A. The first time, that is correct.

Re-Direct Examination by Mr. Larrazolo.

170 Q. Mr. Burns, the first time you mentioned this to him, he said he thought that was taken care of by the carload weight, didn't he?

Mr. McLeod: Would you repeat that?

Mr. Larrazolo: I said, when Burns asked Sapir about the payment on this material, Mr. Sapir told Mr. Burns he thought that had been paid by the carload weight.

The Court: Just a minute. That is entirely misleading and not permissible on re-direct. Let him state what was said.

Q. When you first mentioned to Mr. Sapir about the aluminum, just what did he say with respect to payment?—A. He first said he thought it was a closed deal, that he had paid for all the aluminum involved.

Q. Did he say on what basis he paid for it?—A. During the first interview, he didn't know what he paid for it because Mr. Thurnhoffer kept his papers on the deal, then when we went over the invoice he was surprised to find the last load not on there. He told me it was to go by carload on the railroad, plus the last truck load, the fourth truck load, and he thought it was all paid for.

Q. Did he say anything to you concerning the actual weight of the carload?—A. I went over the invoice together with Mr. Sapir and Mr. Thurnhoffer. It was pointed out right then on the invoice about the car weights.

171 The net weight of the contents was 96,580 pounds, I believe. That was the railroad weight of the aluminum that was acknowledged by Mr. Sapir and Mr. Thurnhoffer,

and he said, "By golly, it doesn't show the last truck load of aluminum. I will send a check immediately to take care of it and that will close the deal."

Mr. Larrazolo: Nothing further.

The Court: Members of the jury, in order that you may not be confused: This witness was asked a question to which he answered that the defendant did not make a statement. In connection with that, I want to instruct you that no person is called upon to make a statement and is required to make a statement. Before a statement is taken from a person accused of a crime by the Government, never is any force used, such statement is made at the wish and desire of the person making the statement himself. The fact that the defendant in this case did not make a statement need not be considered by us as any evidence of guilt. He is not required, under the law, to make a statement.

PHILIP B. DEILY testified as follows:

Direct Examination by Mr. Larrazolo.

Q. State your name, please?—A. Philip B. Deily.

Q. What is your official capacity?—A. Special
172 Agent for the Federal Bureau of Investigation.

Q. Mr. Deily, have you ever had occasion to see Mr. Ben Sapis here before us?—A. I have, sir.

Q. Did you see him on the date of July 29, 1953?—A. Yes, I did, sir.

Q. In whose company were you when you saw him?—A. Special Agent Arthur Burns.

Q. At the time you were with Special Agent Arthur Burns and Mr. Sapis, did you have occasion to see any aluminum ingots on the property of Mr. Sapis here in Albuquerque?—A. I did, sir.

Q. Where was it?—A. It was at a warehouse at 1920 Sawmill Road in Albuquerque.

Q. Did you overhear any conversations between Mr. Sapis and Special Agent Burns with reference to the aluminum, as to where it was going to be kept?—A. Yes, sir, I did.

Q. What was that conversation?—A. Special Agent Burns asked Mr. Sapir what he intended to do with the aluminum—

Mr. McLeod: If the Court please, we object to this line of questioning. We don't believe this Special Agent or anybody else has a right to go around informing people what they will do with property.

The Court: Overruled.

173 Mr. McLeod: We object on the further grounds it would be prejudicial to the defendant.

The Court: Overruled.

A. Special Agent Burns asked Mr. Sapir what he intended to do with the aluminum ingots stored in the warehouse at 1920 Sawmill Road, and as I recall, Mr. Sapir mentioned something about having intended to sell the aluminum ingots and Mr. Burns repeated that in that case, in the case Mr. Sapir was going to dispose of the ingots, he would like to take some action with the F.B.I. office and the U. S. Attorney's office relative to those ingots. Mr. Sapir asked Mr. Burns whether he desired the ingots held and kept there and Mr. Burns said that would be decided by the U. S. Attorney, but that what he was interested in was what Mr. Sapir intended to do with the ingots. Finally, Mr. Sapir volunteered the information that so long as there was question as to the title of the ingots, they would remain there at the place at 1920 Sawmill Road until the matter was disposed of.

Q. According to the way I understand the information, Mr. Sapir told Special Agent Burns he would keep those ingots there until the matter was disposed of?—A. Right, sir.

Q. Did you have occasion later on to look at those ingots?

Mr. McLeod: If the Court please, may we approach the bench?

The Court: Yes.

(Discussion ensued between Court and counsel.)

174 Mr. Larrazolo: That's all.

Cross Examination by Mr. McLeod.

Q. I didn't get your name?—A. Philip Benedict Deily.

Q. Correct spelling of that is D-e-i-l-y?—A. That's right.

Q. How long have you been stationed in Albuquerque, Mr. Deily?—A. Approximately a year and several months.

Q. How long have you been in the F.B.I.?—A. Approximately four years and eight months.

Q. Now, you stated on July 29th that you went out to this place and looked at some aluminum ingots with Mr. Sapir and Mr. Burns, is that correct?—A. Yes, sir.

Q. Where did you find those ingots?—A. They were located at a warehouse at 1920 Sawmill Road, in Albuquerque.

Q. You heard Mr. Burns ask him to show him that material?—A. Yes, sir.

Q. And he says, "O.K.," and took you out to show it to you?—A. Yes, sir, he did show it to us.

Mr. McLeod: That's all.

The Court: Re-direct?

Mr. Larrazolo: No further questions.

The Court: You may be excused.

175 Mr. Larrazolo: At this time, the Government rests, Your Honor.

The Court: Proceed for the defendant.

Mr. McLeod: If the Court please, the defense at this time would like to make a motion, in the absence of the jury.

(Counsel and Court confer.)

The Court: Members of the jury, you may retire from the courtroom for a moment, until I send for you. (Addressing counsel.) Mr. McLeod, make your motion.

Mr. McLeod: The Government having rested, the defendant, Ben Sapir, moves the Court that Counts One, Two, and Four of the Indictment be dismissed, for the following reasons:

1. That the evidence in the case shows that at no time was it disclosed that the defendant was aware of the fact that he was dealing with Government property;

2. The Government has failed to make out a case that any crime was committed against the United States Government;

3. The evidence clearly shows there was no criminal intent on the part of the defendant to commit any crime;

176 4. As to Counts One and Four, the evidence clearly shows that at no time was the defendant, Sapir, dealing with any Government agency; as to Count One, the conspiracy count, there could be no conspiracy to defraud the United States Government, unless there was an intent to defraud such Government; further, the evidence shows that Canfield was not an agent of the United States Government—

The Court: Are you still talking about Count One?

Mr. McLeod: Yes. As to Count Four, what has been said as to Count One, we adopt.

The Court: That is the embezzlement count?

Mr. McLeod: No, sir.

The Court: Count Four is bribing an officer or employee of the United States Government?

Mr. McLeod: Yes, sir. As to Count Four, we adopt the same reason that we have given as to Count One, and state that evidence in this case clearly shows that no officer or agent of the United States Government was bribed.

The Court: You are making no motion as to Count Two, separately?

Mr. McLeod: I would like to add this, as to Count Two, which is the embezzlement charge—the stealing and purloining provision of the Statute—the evidence in the case shows that this defendant, Sapir, did not steal, did not purloin, did not convert such aluminum to his own use; further, the United States Government, as to Count Two,
177 through its own witness, has not shown that any Government property was embezzled. We move that

Count Two be dismissed for the further reason that the Government must prove beyond a reasonable doubt that the property stolen was United States Government property; they mention these alleged 14,000 pounds of aluminum as belonging to the United States Government; however, the evidence in this case, by their own witness, shows that there was a stockpile on the premises at the School of Mines at Socorro, New Mexico, and the only witness in this case that has testified was Canfield, where he testified that the aluminum was taken off the pile; yet, the testimony after that further shows that Sapir could easily have been the owner of this property that he is alleged to have embezzled, because the testimony afterwards shows that the School of Mines sold to him certain ingots, 55,000 pounds of them, and those ingots were in this part that was taken, and, if they were taken by him, that could have been any part of that 55,000 pounds sold to him, if so, then that was his own property. The fact that the School of Mines refunded the money to him would not have taken title out of him. There is nothing shown in that contract to allow the School of Mines to buy materials of this kind. If there is any question at all, it is a question of civil action, not a question of criminal action against this man.

The Court: Mr. Larrazolo, where is the evidence in support of Count Four, that this man, Canfield, was acting for the United States Government? Where is there any testimony to the effect that Canfield—there is testimony that he is Purchasing Agent for the School of Mines, but where is there any testimony showing he was acting for the United States Government?

Mr. Larrazolo: There is testimony, in this respect: Being an employee of the School of Mines, and the School of Mines having this contract with the United States Government in which the School of Mines itself was acting as agent of the United States Government—Canfield, being an employee and carrying out the orders of the School of Mines, which in turn was carrying out this contract with the United States Government, was acting as agent of the United States Government and selling Government property. We have had proof after proof, and witness after witness has testified, that this was Government property.

The Court: That is what you call proof that this man was representing the United States Government?

Mr. Larrazolo: The only proof was that he was representing the School of Mines and the School of Mines was acting as the United States Government officially in this capacity; otherwise, they would have no authority to act at all with reference to Government property.

The Court: If bribery—if that was charged in the indictment, that would be sufficient, but the charge is that he was acting for the United States Government, not by any virtue of his employment by the School of Mines, but by reason of his actions—Count Four is stricken. Defendant's motion is sustained, regarding Count Four.

As to Count Two, I am not altogether sure in my mind that the evidence is enough to show embezzlement—embezzlement being an offense, ordinarily, where property is entrusted to the custody of another, which that person does then embezzle and fraudulently appropriate to his own use. I will reserve my ruling on that at this time.

Now, about Count One. We have ample evidence at this time as to the conspiracy. Defendant's motion is overruled, as to Count One. I will reserve my ruling as to Count Two. I will sustain defendant's motion as to Count Four.

And thereafter, on the 4th day of November, 1953, at the hour of 9:30 o'clock a.m., in the Chambers of the Honorable Carl A. Hatch, United States District Judge, in the presence of counsel, the following proceedings were had:

The Court: Let the record show that I am refusing all of defendant's requested instructions, with the exception of those covered in the Court's general charge. I will specifically instruct as to the defendant's failure to take the stand in his own behalf, as requested by the defendant, and I will specifically instruct generally as to the jury's duty in considering the testimony of the co-conspirator, or alleged co-conspirator in the complaint—I will give the customary instruction on that, at large. But the written requested instructions of the defendant will be refused.

* * * * *

185 Mr. McLeod: The defendant, at this time, rests.

The Court: That brings us up to the arguments and instructions. Are you ready to argue at this time, gentlemen, or do you want a short recess? Both parties have closed.

Mr. McLeod: The case having now been completed, all parties having rested, the defendant renews his motion that Count One of the indictment be dismissed.

The Court: I don't know whether I stated this in the record, that I intended to, and do now, sustain defendant's motion to withdraw Count Two. Only Count One remains to go to the jury.

186 Mr. McLeod: We move that Count One be dismissed for the reason that evidence in this case clearly shows that if there was any conspiracy to defraud, it was not to defraud the United States of America, but it was an attempt to defraud the School of Mines. There is absolutely no evidence in this case that at any time the defendant knew, or had reason to know, that the property involved was property of the United States Government. Further, at this time, we re-adopt all the reasons and comments given for our original motion at the end of the Government's case.

The Court: In that connection, I have not told you, but I intend to instruct the jury that, if knowledge of the defendant as to whom the property belonged can be established by substantial evidence, and, if the facts and circumstances in this case are sufficient to convince the jury beyond a reasonable doubt, that the intention was to defraud the United States Government, even though there were no direct evidence on that point, circumstances, if consistent with any known reasons, hypothetically it would sustain or warrant a verdict of guilty, if the jury is so convinced, even without evidence. It must exclude every reasonable doubt and be consistent with that theory as to the guilt of the defendant, before you can convict on circumstantial evidence alone.

* * * * *

187 The Court: Also, members of the jury, in this connection, after the verdict and the jury comes back to report their decision, the roll is called,

Ordinarily, I require promptness in Court. Court is set for 9:30 and I like to have all members present; the lawyers, the witnesses, the jury, all present. This morning you may think that I am late; however, such is not the case. Counsel and I have been going over some of the legal matters in this case, which required discussion, as it developed this morning that counsel on both sides have decided to rest upon the evidence you have already heard. There will be no further evidence in the case, both parties have rested, the evidence is closed. Usually, after that, I take a
188 short recess in order that counsel may prepare their notes for argument to the jury, which I will do now in just a moment.

We have been discussing instructions and another matter was called to my attention this morning, regarding which I will now specifically instruct you. I did not take the time to so instruct you at the time you were impaneled, which is something I usually do, and, that is, during the course of a trial, if there is any article in the newspaper concerning the trial in any respect, whether a report of proceedings or anything in connection with the trial, jurors should not read such articles, and, if, while listening to the radio, a commentator discusses the case, always turn it off and don't listen to it. This case which has been called to my attention, it appears that there is what purports to be an account of this case in the morning paper. Newspapers have the right to publish accounts of Court proceedings. Jurors have the right to read those accounts, unless they are instructed to the contrary. Because I did not so instruct you earlier, I will not require any of you to state whether you did read the article or not. But, if you did by any chance read about this particular case, I now specifically instruct you to disregard totally and completely everything
that was read or stated in the newspaper article. It
189 is immaterial whether it was a true or correct statement of the proceedings of the trial, altogether immaterial, because you jurors are sworn to, and it is your duty to, return your verdict based solely according to the evidence heard in the Courtroom. For that reason, you are cautioned to let nothing happen, such as any person discussing with you some of the matters which occurred here in the Courtroom. I want you to be very careful, if you did read an ar-

ticle or heard anything over the radio, to put those things out of your mind, and when you retire to the jury room, you must just consider the testimony and nothing else whatever.

With that instruction, we will take a ten- to fifteen-minute recess, before the arguments of counsel.

The Court: Members of the jury, before the arguments begin, I think I should clarify the situation, so that you will better understand the arguments of counsel.

I told you in the beginning that there were three counts of the indictment: In the First Count the defendant is charged with conspiracy; in the Second Count, he is charged generally with embezzlement; and in the Third Count, he is charged generally with attempted bribery or bribery
190 of the man, Canfield, acting in the interests of the United States Government.

Now, as I have told you before, you are the exclusive judges of the facts and I am the judge of the law. There are certain legal techniques which have resulted in connection with Counts Two and Four—relating to embezzlement and attempted bribery—however, you are not concerned with the legal reasons, but you are informed that I have withdrawn from your consideration those two counts. There will be left for your determination Count One, which generally charges the offense of conspiracy. That will be the decision you will have to make on that count, and when I instruct you, I will explain all of the essential elements of that count of the indictment.

I might explain that counsel are not arguing those other two counts. They will confine their arguments to the First Count of the indictment. You, of course, understand that you will not speculate as to why the other two counts were withdrawn.

I do have something to do besides rule as to the procedure in the case and this was one of my privileges. The jury will consider only Count One of the indictment.

Proceed with the arguments, counsel.

(Counsels' arguments to the jury follow.)

191 The Court: Members of the jury, you will now receive the instructions of the Court.

For your information, the Court usually uses written instructions; however, it is not my custom to write out instructions. I much prefer to instruct the jury orally, but perhaps in the next case on trial I may write out the instructions. I, however, much prefer rather talking to the jury and explaining the best I can, avoiding legal techniques and terms so far as possible, just what the law of the case is, and, because the instructions are not written, only oral, I request that you do pay particular attention to what I say, for you will have to remember and depend upon your own memory for the law of the case, as I give it to you.

The defendant, Ben Sapir, is on trial before you under an indictment charging him in the First Count thereof—the count which is for your consideration—with the offense of conspiracy to defraud the United States.

Under the laws of the United States, it is a crime for persons to conspire to defraud the United States and, in this particular case, the defendant has entered his plea of not guilty to that charge. The burden of proof of the plea of not guilty rests upon the United States Government to establish to your satisfaction and beyond a reasonable doubt the guilt of the defendant of the offense charged—
192 that he conspired to defraud the Government of the United States.

In this connection, I charge you that in order to constitute the crime of conspiracy, the gist of the offense is the essential element of the agreement to violate some law of the United States. That agreement does not have to be set out in writing, sworn to and subscribed to by the parties. But the intent each has for an illegal conspiracy is an issue to be established by direct proof of the express agreement, but, nevertheless, the agreement can be arrived at by a meeting of the minds of the conspirators and can be established by all the facts and circumstances presented on the stand. Whether there is any direct proof of any express agreement or not, it is sufficient from the acts and conduct of the parties and from the gist of the offense to establish that part of the crime, that the parties, co-conspirators in this case, charged to be the defendant, Ben Sapir, and the

witness, Canfield, if they had an understanding, a meeting of the minds, that they did scheme and devise to defraud the United States Government. If that has been established beyond a reasonable doubt, then that element of the offense is so established and is sufficient proof.

193 However, in the crime of conspiracy, while I have told you that agreement to violate some law is an essential part of the crime, it is necessary, to make it a complete crime, that some act be done or performed by the one or both of the co-conspirators to carry the illegal agreement into effect. It is not necessary that the illegal agreement be established or that the act itself which is done be an unlawful act, it is sufficient if either co-conspirator, or both of them, do some act to carry into effect the illegal agreement.

The Government in this case charges, first, that the conspiracy consisted of an agreement between the two men that these aluminum ingots, for which the defendant, Ben Saper, was alleged the highest bidder, would be loaded on the railroad cars at Socorro, New Mexico, and be paid for according to the weight; but, there has been some evidence that it was agreed that a truck load would be taken by the defendant to Albuquerque, and not weighed and not accounted for. That is the gist of the illegal agreement, thereby resulting in defraud of the United States Government.

The overt act was that the truck was taken to Albuquerque, New Mexico, and was not accounted for or paid for, according to its weight. The second overt act was that the defendant paid Canfield the sum of \$200 in performance of the alleged illegal agreement. If these
194 acts are part of the agreement itself, if they did make that agreement to first put these aluminum ingots on the railroad cars and then let him take one truck load without being weighed, without accounting for it and not paying for it, that part of the agreement must be established beyond a reasonable doubt by the evidence of this case. One or the other of these overt acts must be established beyond a reasonable doubt—you must believe from the evidence in the case that the defendant did actually take a load of ingots from Socorro to Albuquerque and did not weigh or pay for it. Or, it is not necessary to establish that act be-

yond a reasonable doubt, if the other illegal overt act is established—if he paid the witness Canfield the sum of \$200 in performance of the illegal conspiracy in order to carry it into effect. If that has been established by the evidence in your mind, that would be sufficient.

But, it takes, first, an unlawful agreement, and then the commission of one of the two overt acts I have just outlined, to establish the crime of conspiracy. If this has been established to your satisfaction, beyond a reasonable doubt; if the two men did have a meeting of the minds and did plan to defraud the United States Government, and one of those overt acts was committed—if those facts have
195 been established to your satisfaction and beyond a reasonable doubt, based on the evidence in this case, it is your duty to find the defendant guilty as charged.

On the other hand, if any one of those overt acts has not been established to your satisfaction, beyond a reasonable doubt, or, you believe the defendant to be not guilty, you will return a verdict of not guilty.

The defendant is presumed to be innocent of the offenses charged, and that presumption goes with the defendant and remains with him throughout the entire trial and until his guilt is established by the evidence beyond a reasonable doubt.

I want to explain to you the meaning of "reasonable doubt." Please listen carefully, because if there is any doubt at all in any mind, he should be acquitted. A "reasonable doubt," as used in these instructions, is such a doubt as would cause a reasonable and prudent man in the graver and more important affairs of life to pause and hesitate to act upon the truth of the matter charged. But a reasonable doubt is not a mere possibility of innocence, nor a caprice, shadow or speculation as to the innocence not arising out of the evidence or the want of it. You should carefully weigh and consider the evidence and bring to bear upon it the exercise of common sense and judgment
196 as reasonable men; and if, after considering all the evidence, you can say you have an abiding conviction of the truth of the charge contained in the indictment, then you are satisfied beyond a reasonable doubt.

In this case, members of the jury, the witness Canfield took the stand and testified as to the points you will remember, and, I charge you now, that he is what in law is known as a co-conspirator or an accomplice. And, the jury is always instructed that they should weigh carefully the testimony of the accomplice in this crime and consider any motive he might have had in giving the testimony he might have given. In considering his testimony as an accomplice and co-conspirator, you should not disregard his testimony simply because of that fact. He had entered a plea of guilty to the offense charged, and if you feel that the witness stated the truth of the transaction, as testified before you, you should not disregard somebody because he was a co-conspirator. If, by the evidence, you believe his testimony to be truthful, that he committed the act, you may consider the testimony and give it the credit it is entitled to receive. Besides considering the fact he himself admitted his guilt. If you so believe, his testimony is to be weighed and considered together with all other testimony, in passing upon the guilt or innocence of the defendant.

197 I instruct you now, that it is always the duty of the jury not to decide the case upon any one single point of evidence, but you are to weigh and consider all of the evidence together.

There has been a great deal of discussion in this case as to whether or not the property involved belonged to the United States Government, and whether or not there might have been some transaction by which the defendant, Sapir, might have acquired title from the School of Mines, but perhaps the School of Mines did not have any right to sell it and did not have title. The offense charged in this case is that of conspiring to defraud the United States Government. The ownership of the property, whether it was owned by the School of Mines or not, is not a question for you to pass upon. The title to this property is not involved. You are to consider it only insofar as the evidence has disclosed, beyond a reasonable doubt, that there was an intention of the co-conspirators, through the formation of an illegal agreement, to defraud the United States Government, and, if that plan was formed and established to your satisfaction beyond a reasonable doubt, that they did take

certain property which belonged to the School of Mines in order to carry into effect an illegal scheme or plan to defraud the United States Government, then that would be the overt act charged in this indictment to warrant
198 your return of a verdict of guilty, if proven to your satisfaction beyond a reasonable doubt. The reason for that instruction is so that you may not be confused about the ownership of the property, as you are not here to try to decide a civil case.

The defendant is charged with attempting to defraud the United States government. It is essential it be proven that there was a plan or scheme, constituting an overt act. It must be proven that the property was taken. It is the burden of the United States to prove if such acts were performed in order to carry out a plan or scheme to defraud the United States Government. If this has been established to your satisfaction beyond a reasonable doubt, the evidence then is sufficient to warrant your return of a verdict of guilty.

Now, members of the jury, I don't want you to think that by anything I have said about this case that I express any opinion about the evidence whatsoever. I do never want a jury to get the opinion that I am attempting to pass upon the facts of the case, because those are for you, the jury, to determine from all of the evidence in the case. You are not to be influenced in reaching your verdict as to the ultimate guilt or innocence of the defendant on trial by anything the Court has said regarding the evidence in this case.

199 Now, in determining or arriving at your verdict, you have a right to take into consideration all the facts that reflect upon the credibility of a witness who has testified before you. In determining the credibility of a witness and the weight you will give his evidence, you may consider and you should consider his manner and demeanor on the witness stand, his fairness or unfairness, prejudice, bias or interest in the result of your verdict, if any, and any motive any witness may have had in testifying and his opportunity to know and correctly relate the facts about which he testifies. The question of the credibility of a witness and the weight to be given to his testimony is ex-

clusively for the jury, and you are the sole judges where the truth in this case lies.

If you believe that any witness has knowingly and wilfully testified falsely as to any material point of fact in this case, you are at liberty to disregard the whole or any portion of the testimony of such witness, unless the same is corroborated by other competent evidence in the case which you believe to be true.

As I have said, it is for you, the jury, to weigh and consider the testimony of the witnesses and to give to the testimony of each witness the credit that you think it is entitled to receive.

200 The defendant in a criminal case may, if he sees fit, take the stand to testify, becoming a witness in his own behalf, but the law imposes no obligation upon him to testify in his own behalf or as to any material fact in the case; the fact that the defendant in this case did not take the stand and testify as a witness in his own behalf as to any material fact is not to be taken or considered by you in arriving at your verdict; and no presumption whatever is to be raised against him on account of his not testifying in his own behalf. I expressly caution you, when you retire to your jury room, you should not discuss among yourselves any reason why the defendant did not testify.

I further instruct you that in determining the defendant's guilt or innocence of the crime charged, you are to consider only the evidence which you heard from the witness stand. You are not to speculate upon what evidence might have been nor upon evidence that has been ruled out by the Court or has been withdrawn from your consideration. It is your sole duty to determine the guilt or innocence of this defendant upon the evidence you have actually heard and upon the law as given to you by the Court in these instructions.

You have no right to allow your prejudices, or your sympathies, or what may be the consequences of
201 your decision, to affect your verdict; but you are bound by the oath you have taken to decide the case according to the evidence as you have heard it and the law as given you by the Court.

In this connection, I specifically charge you that you, the jury, have nothing to do with any punishment to be imposed, if you return a verdict of guilty; whether this man's liberty is to be taken from him or not, is not to be considered by you in your arrival at a decision. It is a jury's duty to determine the guilt or innocence of a defendant of the crime with which he is charged; it is the duty of the Court to impose the sentence, based upon the law; whatever that sentence may be, that is not for you to consider. However, you may, if you so desire and think it proper in this case, should you find the defendant to be guilty and should you desire leniency or clemency to be extended by the Court in passing sentence, you have the right to make such recommendation, and I will give such recommendation consideration at the proper time.

As I have explained to you, it is the sole duty of you, the jury, to determine the facts in this case based upon all of the evidence you have heard from the witness stand and decide upon your verdict as to whether the defendant is guilty or not guilty of the crime as charged in the indictment.

202 Court Addresses Counsel: Gentlemen, have I overlooked any instructions that I said I would give?

(Discussion between Court and counsel.)

Court Addressing Jury: Counsel called my attention to the fact that I should instruct you further on the question of intent. I instruct you that the intent of the defendant is an essential ingredient of conspiracy. The defendant must have intended to commit the crime charged. Intent is always an important thing in criminal cases because every person committing a criminal offense—in this case there were two conspirators; then, there are some cases where intent is not material—intended to do so; in this case, we are concerned with the intent with which these men formed a conspiracy, if they did, as this is an essential and material allegation of the indictment; that their intent was one to defraud the United States; this must be proven to the jury the same as any other evidence in the case: That they did intend to defraud the United States Government.

In this connection, I instruct you that the intent with which an act is done is seldom if ever susceptible of direct proof. We have no power to ascertain the certain condition of a man's mind. The best we can do is infer his intention or condition of mind by and from the acts he commits. A person is presumed by law to intend that
203 which he voluntarily and wilfully does, and one must also be presumed to intend all the natural, probable, and usual consequences of his acts and conduct. The intent with which a person does a thing is rarely susceptible to direct proof, as it usually remains concealed within the recesses of the mind. Whether there was intent on the part of the defendant, is for you, the jury, to determine. In passing upon the question of intent, you must consider all of the facts and circumstances presented in this case, in order to determine whether the defendant did intend to defraud the Government of the United States. All of the facts and circumstances must be established by the evidence to your satisfaction, beyond a reasonable doubt.

You are instructed that while you must be convinced of the guilt of the defendant from the evidence beyond a reasonable doubt in order to warrant a conviction, still the proof need not be by the direct evidence of a person who saw the offense committed. The acts constituting the crime may be proved by circumstances. And I further instruct you about circumstantial evidence, particularly in a case where there is an accomplice or co-conspirator—if in this case you find and determine for any reason that you should disregard the testimony of the witness Canfield, you are entitled to and should consider all of the facts and
204 circumstances involved in the case, before disregarding such testimony.

By circumstantial evidence is meant the proof of such facts and circumstances connected with or surrounding the commission of the crime charged as tend to show the guilt or innocence of the accused. And if such facts and circumstances are sufficient to satisfy the jury of the guilt of the defendant beyond a reasonable doubt, then such evidence is sufficient to authorize the jury in finding a verdict of guilty. But, you are instructed that before you would be authorized to find a verdict of guilty against the defendant

where the evidence is circumstantial, the facts and circumstances shown in the evidence must be inconsistent with any reasonable theory of the innocence of the defendant and incapable of explanation upon any reasonable conclusion other than that of the guilt of the defendant.

As I have told you, the jury is the exclusive judge of the facts in this case and the Court is the sole judge of the law. You are to depend upon your own memories for the evidence in the case and not upon the statements of counsel.

You may now retire to your jury room to deliberate upon your verdict; but, before beginning your deliberations, you will first select one of your number as foreman. When you have reached your verdict, your foreman will sign the same and you will then return into open Court.

205 You will be handed two forms of verdict: One, finding the defendant guilty as charged in Count One of the indictment; and the second, finding the defendant not guilty of the crime charged in Count One of the indictment.

Should you have any questions as to the law of the case, or should you desire testimony read to you, you have a perfect right to come back into Court and ask for what you might desire; however, should you desire to do this, you must get word of your wishes to the Bailiff, as the law requires communication between the Court and the jury to be in open Court, in the presence of counsel and Court.

You may now retire.

The Court: Gentlemen, if you want to except to the Court's charge, you may do so at this time.

Mr. McLeod: At this time, the defendant objects and excepts to the following charges given by the Court to the jury: (1) The defendant objects and excepts to that part of the charge on reasonable doubt, which was expressly given by the Court, in which he says, in effect, to the jury: That he had found on occasions that a juror might consider anything a reasonable doubt. Our contention being that the charge should have been given, without the comments of the Court.

206 The Court: That was provoked by the argument of counsel.

Mr. McLeod: (Continuing.) We say that those comments were highly prejudicial to the defendant. (2) We object to that part of the charge where the Court said that if the property was used by the School of Mines and was used for the purpose of defrauding the United States Government, it could still be conspiracy. We object to this for the reason that there was no issue in this case that would support such a charge. The charge was highly prejudicial. We believe it was misleading and confusing to the jury and would place in their minds the thought that it would not make any difference who the property belonged to—that if any conspiracy had been committed, it would be committed against the United States Government.

The Court: I want the record to show that instruction was given in the light of the argument by defense counsel. The jury would have inferred that if they believed the property had been the property of the School of Mines, it was their duty to acquit the defendant.

Mr. McLeod: (3) We object to that part of the charge given by the Court where he informed the jury that if, upon a verdict of guilty, they feel that clemency or leniency should be recommended in sentencing the defendant, that they should make such recommendation to the Court—
207 that they would be at liberty to do so. We object to this charge, for the reason that it would place in the minds of the jury the thought that if any member of the jury should hold out, the Court would probably go along on a compromise basis.

The Court: Do you want that instruction withdrawn, Mr. McLeod?

Mr. McLeod: If the Court please, I think the damage has already been done.

The Court: Let's have the jury come back. I don't want an objection of that kind. As for that instruction, sometimes I give it and sometimes I don't. We will call the jury back and I will explain it fully, if you want that done.

Mr. McLeod: We will withdraw that objection. (3) We

object to the instruction of the Court where he used the plural in describing the intent of these men; as the law is that, if one man might intend one thing, another might intend an entirely different thing; but, if they were together, one man could still be convicted of conspiracy and the other man not convicted of conspiracy.

The Court: I have no comment on that one. I think it was the intent of the defendant himself.

Mr. McLeod: (4) We object to that part of the charge to the jury where the court went into the question of the jury having a right to search the recesses of the mind to
208 determine whether or not there was intent upon the part of the defendant. We do not believe that it is a correct instruction to be given to the jury in the form in which it was placed; further we believe it is highly prejudicial to the defendant in this case.

The Court: Does the Government desire to object to the Court's charge?

Mr. Larrazolo: No, Your Honor.

Filed with exhibits, May 1, 1954.

[Defendant's Requested Instruction No. 10.]

S-13 You are instructed that before you can find the defendant, Ben Sapir, guilty of the crime of conspiracy, you must first find that he knew the aluminum was the property of the Government and secondly that he intended to conspire to steal such aluminum from the Government, and if you should find that Ben Sapir did conspire to steal the aluminum, but thought or intended to conspire to steal such aluminum from *someother* other than the Government, then you must bring in a verdict of acquittal.

S-4 Instructions One to Twelve are hereby refused, to which the defendant objects and excepts.

CARL A. HATCH,
District Court.

Filed U. S. District Court, Nov. 4, 1953. Filed U. S. Court of Appeals, as part of supplemental record, June 7, 1954.

[Plaintiff's Exhibit 1 is an invitation, bid and acceptance (short form contract). The designated portions thereof are printed at pages 18 to 27.]

Plaintiff's Exhibit 2.

New Mexico Institute of Mining and Technology.

Office of the Purchasing Agent.

**Campus Station,
Socorro, New Mexico.**

**Invitation, Bid and Acceptance,
(Short Form Contract.)**

Please return your bid with invitation number, date and hour of opening shown on the outside of sealed envelope.

Work Order No. Account No. T-W Bid No. 27.

Invitation.

Sealed bids, subject to the conditions on the reverse side hereof will be received at: Office of Purchasing Agent, New Mexico Institute of Mining and Technology, Campus Station, Socorro, New Mexico, on this form, until 9:00 A.M., M.S.T., on May 19th, 1953, and then publicly opened, for the sale of items as listed below, to be sold "as is, where is." F.O.B. New Mexico Institute of Mining and Technology, Campus Station, Socorro, New Mexico.

Item	To Be Filled In by Bidder			
No. Articles or Services	Quan.	Unit	Unit	Price Total
For Sale by the N. M. Institute Mining & Technology, Socor- ro, N. M.				

Scrap:

- | | | | | |
|--|----------------|------|-------|--------------|
| 1. Aluminum, resmelted,
in ingot form, appx. | | | | |
| 48 lbs. per ingot | 100,000 lbs. | lb. | .1583 | 15,830.00 |
| 2. Brass, oil radiators,
removed from air-
craft | Appx.
1,500 | lbs. | lb. | .1215 182.25 |

A bid deposit of 20 percent of the total amount, in the form of a postal or express money order, or cashier's or certified check, is required. This deposit to be made payable to the N. M. Institute of Mining and Technology. The deposit of unsuccessful bidders will be returned immediately after the bid opening.

This scrap must be removed within 15 days after notification of award. Small samples of item #1 will be mailed to bidders upon request. For information, contact: H. R. Canfield, N. M. I. M. T., Telephone 588, Socorro, N. M.

Approved May 19, 1953,

s/ J. F. GILL,
Development Contract Officer,
USN, State College, New
Mexico.

Accepted 25 May, 1953. H. R. C.

H. R. CANFIELD,
Purchasing Agent.

Bid.19.....

In accordance with the above invitation for bids, and subject to the conditions thereof, the undersigned offers and agrees, if this bid be accepted within days from the date of opening, to purchase any or all items upon which prices are quoted, at the price set opposite each item, pick-up at the point specified, and unless otherwise specified, within days after receipt of order.

Bidder: United Iron & Metal Co. Address: P. O. Box 1627, Albuquerque, N. M.

By: Ben Sapir. Title: Partner.

(Signature of person authorized to sign this bid.)

Acceptance.

Acceptance recommended as to items Numbered.....

Accepted: New Mexico Institute of Mining & Technology.

By: By:

Title: Title:

Instruction to Bidders.

1. Samples of items, when required, must be furnished, free of expense, prior to the opening of bids, and, if not destroyed, will upon request be returned at the bidder's expense.
2. Prices should be stated in units or quantity specified, with packing included.
3. Time of proposed delivery must be stated in definite terms. If time varies for different items the bidder should so state.
4. Envelopes containing bids must be sealed and marked on the upper lefthand corner with the name and address of the bidder and the date and hour of opening, and mailed or delivered to the address at point of opening.

Conditions.

1. New Mexico Institute of Mining and Technology reserves the right to reject any and all bids, to waive any informality in bids, and unless otherwise specified by the bidder, to accept any item on the bid.
2. In case of error in the extension of prices in the bid, the unit price will govern.
3. Time in connection with discount offered, will be computed from date of delivery or from date correct bill rendered on proper voucher form, certified by contractor, is received, whichever date is latest.

Plaintiff's Exhibit 3.

NW/2/DCONM 13348/L8-5/JFG.

411 Fannin Street, Houston 14, Texas

10 April 1953

From: Inspector of Naval Material (Development Contract Officer, USN, State College, New Mexico.

To: Chief Bureau of Ordnance (Co) Washington, D. C.

Subj: Contract NORD 13348; New Mexico Institute of Mining and Technology, Socorro, New Mexico; aluminum scrap disposal.

211 1. I have been advised that under subject contract, the NMIMT is permitted to melt down and sell aluminum scrap which has been acquired from government furnished aircraft used in tests at Socorro, New Mexico.

2. Contractor has advised me that they were authorized by Washington to apply the proceeds from sale of the above scrap to the cost of work covered by the contract.

3. Crediting of proceeds in the above manner, actually increases the amount of government money to be spent by the contractor, by the amount of the proceeds received from the sale of scrap. Since this amount will be in the neighborhood of thirty to fifty thousand dollars, I would appreciate advice from your office which confirms the above application of money received from sale of the government furnished aluminum scrap.

4. An expeditious reply would be appreciated since sale of the first lot of aluminum ingots has been completed.

J. F. GILL.

cc: SINM Houston.

Plaintiff's Exhibit 4.

Department of the Navy
Bureau of Ordnance
Washington 25, D. C.

27 Apr., 1953.

Department of Defense, United States of America.

In reply refer to Cole-3-MBG:bh, NOrd-13348.

From: Chief, Bureau of Ordnance.

To: Inspector of Naval Material, (Development Contract Officer, USN), State College, New Mexico.

Subj: Contract NOrd-13348, New Mexico School of Mines, Socorro, New Mexico, Contractor; Aluminum scrap disposal.

Ref: (a) INM(DCO,USN) State College, New Mexico, ltr to BUORD dtd 10 Apr. 53, file NW/2/DCONM/13348, 1 S-5/JFG.

212 1. In reply to reference (a), the Development Contract Officer, State College, New Mexico, is advised that Paragraphs 1 and 2 of the reference are substantially correct.

2. When scrap is sold, the contractor should submit to the Development Contract Officer the papers in connection with the sale of scrap so that the Development Contract Officer may approve the sale. A copy of the transaction should be furnished the local Cost Inspector who will then show on the next contract voucher a credit to the contract in the amount realized from the sale of the scrap.

3. In connection with Paragraph 3 of reference (a), the attention of the Development Contract Officer is invited to the fact that the subject contract is a term-type contract which provides, under Clause 31, that "the Contracting Officer may, at his election, require the contractor to continue to perform the work beyond the period of the contract set forth in the Schedule" if funds remain unexpended. In view of this, the credit of thirty to fifty thousand dollars to the contract will simply mean that, assuming there is no increase in level of effort under the contract, there will be thirty to fifty thousand dollars remaining in the contract on 30 September, 1953, and with these funds the Bureau will be able to extend the contract for one or two months.

M. F. SCHOEFFEL,

C. F. RAY,

By direction.

Copy to: BuSandA (CIS) (2)

PLAINTIFF'S EXHIBIT 2
Cause No. 17885
11-3-53 - 14a



Plaintiff's Exhibit 6.

214 Santa Fe Railroad Scale Weight Ticket, returned to witness Zimmerly. Marked for identification only, not introduced into evidence.

Plaintiff's Exhibit 7.

New Mexico Institute of
Mining & Technology
Campus Station Socorro, New Mexico

6 April, 1953

Memorandum

To: F. R. Sweet, Comptroller, N. M. I. M. T. From: H. R. Canfield, Purchasing Dept. (s/H.R.C.) Subject: Smelted Aluminum Ingots, Bid #23.

215 I would like your permission to sell all of the smelted aluminum that we have on hand. As you know, this bid was awarded to the United Iron and Metal Co. of Albuquerque, and since the opening of the bid we have accumulated about 100 thousand pounds of the ingots. I feel that we would be taking advantage of the "market" and I am sure that the bidder would be willing to accept a *greated* amount because he plans to load this into a railroad car.

Apr. 7, 1953.

Approved: J. F. GILL.

Development Contract, Officer, USN, State College, New Mexico.

Plaintiff's Exhibit 8.

Invoice

Date: 1 May, 1953

United Iron & Metal Co.
(Vendor's Name)

P. O. Box #1627
(Address)

Albuquerque, New Mexico
(City)

To: New Mexico Institute of Mining and Technology, Socorro, New Mexico.

Date	Item	Unit Price	Amount
4-29-53	Refund of overpayment on bid purchase of aluminum ingots.		
	Amount of Deposit	\$13,720.00	
	Amount of Award	4,510.45	
	Net Refund		\$9,209.55

Purchase 26,300 pounds net aluminum @ \$17.15 per CWT.

N. M. Institute of Mining and Technology, Received May 8, 1953, 9:30 AM.

Please Sign and Return.

216 I certify that the above bill is correct and just, and that payment therefor has not been received.

UNITED IRON AND METAL COMPANY,
JOHN THURNHOFFER,
Partner.

Plaintiff's Exhibit 9.

Invoice No. T- V NOrd-13348

New Mexico Institute of Mining & Technology, College Division, Campus Station, Socorro, New Mexico.

Date 17 June, 1953

To: United Iron & Metal Company, P. O. Box: 1627, Albuquerque,, New Mexico.

Invoice

217 Bid No. 53-27, Opened 19 May, 1953 (Scale of smelted aluminum ingots and scrap brass.)

Smelted aluminum ingots loaded into RR Car T&NO-54771, Ref: Certified weight slip signed by S. J. Zimmerly, Agent for AT&SF RR.

142,580 Gross wgt. of car
 46,000 Tare wgt.

96,580 lbs. Net weight of aluminum at .1583 per lb.
 \$15,288.61

Scrap brass oil radiators as weighed by
 N.M.I.M.T. and witnessed by Mr. B. Sapisr.

2,998 lbs. Net weight of scrap brass at
 .1215 per lb. 364.26

Total amount of sale	15,652.87
Less deposit paid with bid	3,400.00

Net Amount Due	
To Be Paid By Certified Check	\$12,252.87

The United Iron and Metal Company hereby acknowledges receipt of the above materials.

UNITED IRON AND METAL COMPANY,
 BEN SAPIR.
 (Signature)

Please Sign and Return.

[Second & Third Sheets]

Western Weighing and Inspection Bureau.

Santa Fe	Scale Ticket	No. 379
Date		
Weighed 6/13/53	9:15 p. m.	Initials T & NO
Car weighed		
Uncoupled at Belen, N. M.		Car Number 54771
142580 Gross	Dry x: Wet	Raining Snowing Sleeting
46000 Tare	Date of Tare	Temp. Fixts. Gr. Doors Stakes
	12, 1949	
96580 Net	Capacity	Load Limit
	100,000	123,000

L. F. CRAIG.
 Signature of Sworn Weigh-
 master.

(Attached to above form)
Form 14 Standard.

Santa Fe

ATSF Ry,
(Insert Name of Railway
Company).

(Copy of Scale Ticket)

Santa Fe Scale Ticket

No. 379

The weights shown hereon have been ascertained only to determine the freight charges to be assessed, and their use is governed by published weighing rules.

Date weighed 915p 6-13-53 M Initials T&NO

Car weighed
uncoupled at Belen N. Mex. Car No. 54771

142580	Gross	Dry x: Wet: Rain: Snow: Sleet
46000	Tare	Date of Tare: Temp: Gr.: Stake
		Dec. 1949: Fixt: Doors:
96580	Net	Refuse Ice in: Racks: Blk: Dun
		Tanks: :ing: age

Capacity 100M Load Limit 123,000.

L. F. CRAIG.

Signature of Sworn Weigh-
master.

The above is an exact copy of the Original Scale Ticket.

6/17

1953

S. J. ZIMMERLEY.

*Type ☐

*Pencil ☐

* Show by Cross (x) Mark whether the Gross weight was Imprinted by Type Registering Beam or written with Pencil.

[Fourth Sheet]

New Mexico School of Mines, Socorro, New Mexico
Entered on Cash Journal, Page No.

Date: July 10, 1953

219 Received from United Iron & Metal Co.

Twelve Thousand-two hundred fifty-two & 87/100 Dollars.

In payment of the following: \$12,252.87

Number	Name	Amount
11	Matriculation	\$
12	Tuition	
13	Health Fee	
14	Laboratory Fees	
20	Gymnasium Fee	
410	Accounts Receivable	
460	General Deposit	
461	Student Activity Fee	
655	(in pencil) Deferred Receipts	12,252.87

Remarks or Explanation

(in pencil) CR: T. W. Nord 13348.

Preserve Your Receipts.

No. A 7970

(in pencil) MAGGIE M HALLIS.
Valid Only When Signed by Au-
thorized Employee.

[Fifth Sheet]

When Credited

July 10, '53

July 10, 1953

N. M. Institute of Mining & Technology

Comptroller's Account

Drawn On	Amount	Date	No.	Drawn By	Favor Of	Last End'er
15-119	15.00	7- 6		U. S. Postal	NMIMT-Frank Parker	Us
15-119	10.00	7- 6		U. S. Postal	Dean Johnson	Us
15-119	38.00	7- 8		U. S. Postal	W. L. Bishop	Us
95-195	26.50	7- 8		Rita Voochees	NMIMT	Us
95-1	65.00	7-10		Lucy Shaw	NMIMT	Us
95-1	11.25	7- 3		Lucy Shaw	NMIMT	Us
95-195	25.00	7-10		S. E. Reynolds	NMIMT	Us
95-195	79.25	7-10		Mrs. John Harty	NMIMT	Us
95-195	20.00	7- 9		Dan Barry	NMIMT	Us
95-195	29.95	7-25		NMIMT	Stuart Johnson	Us
95-205	127.37	7- 1		Chapman & Wood	Charles Corley	Us
95-65	11,261.12	6-24		United Iron & Metal	NMIMT	Us
95-8	991.75	7- 3		United Iron & Metal	NMIMT	Us
95-65	3.28	6-30		Earl Douglas	NMIMT	Us
55-14	227.19	7- 6		Amer. Platinum Works	NMIMT	Us
3 -9	33.70	6-24		Indemnity Ins. Co.	NMIMT	Us

 12,964.36

Less Cash

Return 174.56

 Net Dep. 12,789.80

Plaintiff's Exhibit 10.

United Iron & Metal Company, Albuquerque, New Mexico.

July 30, 1953.

New Mexico Institute of Mining and Technology, Campus
Station, Socorro, New Mexico.

Attention: Mr. Canfield, Purchasing Agent.

221 Gentlemen: We enclose Cashier's check No.
A76180, in the amount of \$2,216.20, in payment of
14,000 pounds of aluminum ingots at \$.1583 per lb., awarded
us under bid No. 53-27, Opened May, 1953.

This represents the load that was hauled to Albuquerque
by truck, and was not included in your statement dated
June 17, 1953.

Very truly,

JOHN THURNHOFFER.

(Envelope attached to above letter).

United Iron & Metal Company
103 E. New York Ave. P. O. Box 1627, (U. S. Postage 20¢)
Albuquerque, New Mexico. (U. S. Postage 20¢)

New Mexico Institute of Mining & Technology, Campus
Station, Socorro, New Mexico.

Attention: Mr. Canfield, Purchasing Agent.

Registered No. 102210

(P. O. stamps appearing on reverse side of envelope)

Albuquerque N. Mex., July 29, 1953.

Socorro, N. Mex., July 30, 1953.

Plaintiff's Exhibit 11.

October 15, 1953

United Iron and Metal Company, 103 Lomas Boulevard, N.
E., Albuquerque, New Mexico.

222 Gentlemen: We enclose herewith your Cashier's
Check #A76180, dated July 29, 1953, from the First

National Bank in Albuquerque, in the amount of \$2,216.20, which was sent to us by your Company with letter dated July 30, 1953.

You hold approximately 14,000 pounds of aluminum ingots which were unlawfully taken from the New Mexico Institute of Mining and Technology, which Institute is entitled to possession thereof as agents of the United States Government, the lawful owner of the aluminum.

The bearer of this letter, Mr. M. L. Kempton, is authorized to take possession of the aluminum ingots, and you are directed to turn them over to Mr. Kempton.

Very truly yours,

FRED R. SWEET,
Comptroller.

Approved: John F. Gill, Development Contract Officer,
USN.

FRS:ecp.

Defendant's Exhibit A.

223 Printed Matter of U. S. Navy—marked for identification only, not introduced into evidence.

Photographic Copy

95-1

1022

First National Bank in Albuquerque

95-1

Balance due for material
awarded under Bid 53-27,
Opened May 1953.

Albuquerque, N. M. July 29, 1953. No. A76180

Pay to The

Order of New Mexico Institute of Mining
and Technology

\$2,216.20

First National Bank in Albuquerque

\$2216 and 20 cts Dollars

Cashier's Check

United Iron and Metal Co.

J. W. HUNT,
V. P.

Defendant's Exhibit B.New Mexico Institute of Mining and Technology
Campus Station Socorro, New Mexico
Formerly New Mexico School of Mines

May 25, 1953

United Iron & Metal Company, P. O. Box 1627, Albuquerque, New Mexico.

Attention: Mr. Ben Sapir.

Subject: Notice of Award, Bid #27.

224 Gentlemen: You are hereby notified that your bid for approximately 100,000 lbs. of Resmelted Aluminum ingots at .1583 per lb. and approximately 1,500 lbs. of Brass Oil Radiators at .1215 per lb. has been accepted. Your certified check in the amount of \$3,400.00 will be held, by us, as part payment. Balance will be due as soon as the final weights are determined.

In accordance with the bid, you have a total of 15 days, from the date of this letter, to remove these items from our property. Kindly make all of your loading arrangements through this office. Many thanks for your interest in our bid.

Very truly yours,

H. R. CANFIELD,
Purchasing Agent.

HRC/gd

Defendant's Exhibit C.

By endorsement this check is accepted in full payment of the following account.

Scrap Aluminum Deposit on Bid.

First National Bank, Albuquerque, New Mexico.

Certified, good for \$4287.50, when properly endorsed.

J. W. Hunt, V. P.; No. 9351; Date 4-4-53.

United Iron and Metal Co.

Scrap Dealers

103 Lomas Blvd. NE

P. O. Box 1627

Albuquerque, New Mexico, April 4, 1953. No. 1575

Pay To The

Order Of New Mexico Institute of Mining

and Tech. \$4287.50

4287 Dols 50 cts Dollars

95-1

1022

First National Bank in Albuquerque, N. M.

UNITED IRON AND METAL Co.

BEN SAPIR.

JOHN THURNHOFFER.

Defendant's Exhibit D.

By endorsement this check is accepted in full payment of the following account.

Aluminum Ingot, additional payment for 55,000 lbs. Aluminum Ingot at \$17.15 'lb.

First National Bank, Albuquerque, New Mexico.

Certified, good for \$9432.50, when properly endorsed.

Chrystal Lovelady, Asst. Cashier; No. 9355; Date: 4-8-53.

United Iron and Metal Co.

Scrap Dealers

103 Lomas Blvd. NE

P. O. Box 1627

Albuquerque, New Mexico, April 8, 1953. No. 1589

Pay To The
 Order Of N. M. Institute of Mining
 Technology \$9432.50
 9432 Dols 50 cts Dollars
 95-1
 1022

First National Bank in Albuquerque, N. M.

UNITED IRON AND METAL CO.
 BEN SAPIR.
 JOHN THURNHOFFER.

[The above cancelled checks bear on the reverse "Pay to the order of First State Bank, Socorro, New Mexico, for deposit only. New Mexico Institute of Mining and Technology, Comptroller's Account," and bank stamps.]

Defendant's Exhibit E.

C 781

New Mexico Institute
 Of Mining & Technology

Campus Station, Socorro, New Mexico

Pay to the order of
 United Iron & Metal Company

May 5 53, 781, \$9,209.55
 Date Check No. Amount

New Mexico Institute of Mining
 & Technology \$9209 and 55 cts

NEW MEXICO INSTITUTE OF MINING & TECHNOLOGY.
 Comptroller's Account.
 FRED R. SWEET

First State Bank of Socorro,
 Socorro, New Mexico.

[The above check bears on the reverse, "United Iron and Metal Co., for deposit only", and bank stamp.]

Defendant's Exhibit F.

Notice of Bid.

The Purchasing Agent of the New Mexico Inst. of Mining and Technology, Socorro, New Mexico, is calling for bids for the sale of the following:

For Sale by N.M.I.M.T. Appx. 25,000 pounds of Aluminum, smelted, in 50 to 55-lb ingots.

Any person or firm wishing to bid on this material can obtain a bid form from the Purchasing Agent, N.M.I.M.T., Socorro, N. M. (Telephone 588). Bid number is No. 23, opening to be 10:00 a. m., March 25, 1953.

Journal, March 7, 8, 9, 1953.

State of New Mexico, County of Bernalillo, ss.

D. V. MURDOCK, being duly sworn declares and says that he is Bus. Rep. of the Albuquerque Journal, and that this newspaper is duly qualified to publish legal notices or advertisements within the meaning of Section 3, Chapter 167, Session Laws of 1937, and that payment therefor has been made or assessed as court costs; that the notice, a copy of which is hereto attached, was published in said paper in the regular daily edition, for three times, the first publication being on the 7th day of March, 1953, and the subsequent consecutive publications on March 8, 9, 1953.

D. MURDOCK.

Sworn and subscribed to before me, a Notary Public in and for the County of Bernalillo and State of New Mexico, this 10th day of March, 1953.

(Seal)

VELMA VIPPERMAN,
Notary Public.

My commission expires October 27, 1955.

Defendant's Exhibit G.

Notice of Bid.

The Purchasing Agent of the N. M. Institute of Mining and Technology, Socorro, N. M., offers for sale the following scrap metals by the bid method:

Approximately: 100,00 lbs. Aluminum, resmelted, in ingot form:

Approximately: 1,500 lbs. Brass, oil radiators.

The bid number is 27 and the opening will be at 9:00 a. m., May 19, 1953. Interested parties may contact the Purchasing Agent N.M.I.M.T., Telephone 588, Socorro, N. M.

Journal, May 4, 5, 6, 1953.

State of New Mexico, County of Bernalillo, ss.

D. V. MURDOCK, being duly sworn declares and says that he is Bus. Rep. of the Albuquerque Journal, and that this newspaper is duly qualified to publish legal notices or advertisements within the meaning of Section 3, Chapter 167, Session Laws of 1937, and that payment therefor has been made or assessed as court costs; that the notice, a copy of which is hereto attached, was published in said paper in the regular daily edition, for three times, the first publication being on the 4th day of May, 1953, and the subsequent consecutive publications on May 5, 6, 1953.

D. MURDOCK.

Sworn and subscribed to before me, a Notary Public in and for the County of Bernalillo and State of New Mexico, this 6th day of May, 1953.

(Seal)

VELMA VIPPERMAN,
Notary Public.

My commission expires October 27, 1955.

Received May 8, 1953.

Defendant's Exhibit H.

227-A The following is an excerpt from page twenty-seven of the September 22, 1953, issue of the Albuquerque Journal.

Legal Notices

Advertisement for Bid

The Purchasing Dept. of the N. M. Institute of Mining & Technology, Socorro, N. M. is calling for bids on surplus

Government owned equipment. Bids may be obtained by contacting the Purchasing Dept., N.M.I.M.T., Socorro, N. M. Telephone 588, Bid No. 6. Opening to be at 10:00, October 7, 1953. Journal, Sept. 21, 22, 23, 1953.

Defendant's Exhibit I.

Purchase Voucher

For Purchases, and Services other than Personal

State of New Mexico

New Mexico Institute of Mining and Technology

Socorro, N. M., May 1, 1953

To: United Iron & Metal Company, P. O. Box 1627 (Payee)
Albuquerque, New Mexico.

Articles or Services	Amount	
	Dollars	Cents

Refund of overpayment on bid purchase of
aluminum ingots

Amount of Deposit	\$13,720.00
-------------------	-------------

Amount of Award	4,510.45
-----------------	----------

Net Refund

9,209.55

Purchase 26,300 pounds net aluminum @
\$17.15 per CWT.

Payee Sign here.

I certify that the above bill is correct and just and that
payment therefor has not been received.

Payee: United Iron & Metal Company.

Signature of Payee must be in ink or indelible pencil.

Per: _____

Title: _____

Accounting Classification

To be paid from Research Fund \$9,209.55

Checked by:

228 I, or We, certify that the above articles were received in good condition after due inspection thereof, or the services rendered as stated; that they were necessary and proper and that the amounts claimed are just and reasonable and that no part thereof has been paid.

NEW MEXICO INSTITUTE OF MINING & TECHNOLOGY,

Approved:

Title: Chief Clerk.

Comptroller

Paid May 5, 1953.

Check No. C 781.

P. O. No. 51(\$9,209.55) Complete.

Vou. No. 6880.

Clerk's Certificate.

252 I, WM. D. BRYARS, Clerk of the United States District Court for the District of New Mexico, do hereby certify:

That the foregoing pages, numbered 1 to 251, inclusive, are the originals of the pleadings, orders, and documents, and of the reporter's transcript of the evidence and trial proceedings including copies of the exhibits, in that certain criminal cause lately pending in said court and entitled and numbered as shown in the title page of this record, as specified in the Designations of the parties appearing at pages 247 and 248 hereof.

In Witness Whereof, I hereunto subscribe my name and affix the seal of said court at Albuquerque, in said district, on this the 11th day of May, 1954.

(Seal)

WM. D. BRYARS,

Clerk of Said Court.

Filed, United States Court of Appeals, Tenth Circuit,
May 13, 1954. Robert B. Cartwright, Clerk.

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Supreme Court of the United States

October Term, 1954

No.

BEN SAPIR

Petitioner

vs.

UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, FOR THE TENTH CIRCUIT

*To the Honorable Chief Justice and the Associate Justices
of the Supreme Court of the United States:*

Your petitioner, BEN SAPIR, respectfully prays that a Writ of Certiorari be issued out of and under the seal of this Court, to review the Orders of the United States Court of Appeals for the Tenth Circuit, entered in this case November 17, 1954, modifying the Opinion and Judgment of said Court entered in this case October 20, 1954.

OPINIONS BELOW

There was no Opinion in the District Court. The Opinion of the Court of Appeals (Phillips, Chief Judge, and Huxman and Murrah, Circuit Judges) has not yet been reported but appears in the Record on Certiorari at Pages 159 to 163, and a printed copy thereof is appended to this Petition. No Opinion was rendered upon the Motion to Amend the Opinion and Judgment, nor was any Opinion rendered upon the Petition for Rehearing.

STATEMENT OF JURISDICTION

The Order and Judgment of the Court of Appeals for the Tenth Circuit sought to be reviewed were both dated November 17, 1954, entered on the same date (R. 176).

Time to petition for rehearing was extended to December 1, 1954, by Order dated and entered November 20, 1954 (R. 177). Petition for Rehearing was denied by Order dated and entered December 13, 1954 (R. 181). On December 14, 1954, an Order was entered staying issuance of the Mandate for a period of thirty days from said date (R. 181).

The jurisdiction of this Court is invoked under 28 USC, Section 1254 (1).

QUESTIONS PRESENTED FOR REVIEW

1. Did the Court of Appeals for the Tenth Circuit, after having reversed petitioner's conviction and entered judgment directing dismissal of the indictment, have power to consider evidence outside of the record, submitted in support of the Government's Motion for an amendment of the Judgment, so as to direct a new trial?

2. If the Court of Appeals for the Tenth Circuit had the power, after entering its Judgment reversing the conviction, to consider evidence outside of the record, was the Government's showing in support of its request for a new trial timely and adequate?

3. After petitioner's conviction was reversed for insufficiency of the evidence and judgment entered by the Court of Appeals for the Tenth Circuit directing dismissal of the indictment, did the Government's application for a new trial, and its production of allegedly newly discovered evidence outside of the record, violate the Fifth Amendment

to the Constitution of the United States prohibiting double jeopardy?

4. Where petitioner moved for judgment of acquittal at the end of the Government's case, under Rule 29 (a) Federal Rules of Criminal Procedure, but did not move for a new trial under Section (b) of said Rule, is the direction of a new trial by the Court of Appeals a proper determination under Title 28 USC, Section 2106, in spite of the finding of the Court of Appeals that the Motion for judgment of acquittal should have been granted?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The following constitutional and statutory provisions are involved, and are quoted herein in full:

Fifth Amendment to the Constitution of the United States:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Title 28, USC Section 2106:

"The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree or order of a court lawfully brought before it for review, and may remand the

cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances. June 25, 1948, c. 646, 62 Stat. 963."

Rule 29, Federal Rules of Criminal Procedure:

"(a) *Motion for Judgment of Acquittal.* Motions for directed verdict are abolished and motions for judgment of acquittal shall be used in their place. The court on motion of a defendant or of its own motion shall order the entry of judgment of acquittal of one or more offenses charged in the indictment or information after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses. If a defendant's motion for judgment of acquittal at the close of the evidence offered by the government is not granted, the defendant may offer evidence without having reserved the right.

"(b) *Reservation of Decision on Motion.* If a motion for judgment of acquittal is made at the close of all the evidence, the court may reserve decision on the motion, submit the case to the jury and decide the motion either before the jury returns a verdict or after it returns a verdict of guilty or is discharged without having returned a verdict. If the motion is denied and the case is submitted to the jury, the motion may be renewed within 5 days after the jury is discharged and may include in the alternative a motion for a new trial. If a verdict of guilty is returned the court may on such motion set aside the verdict and order a new trial or enter judgment of acquittal. If no verdict is returned the court may order a new trial or enter judgment of acquittal."

Title 28 USC, Section 1291:

"Final decisions of district courts:

"The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of

the United States, the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. June 25, 1948, c. 646, 62 Stat. 929."

REASONS FOR ALLOWANCE OF THE WRIT

1. Each of the questions presented herein embodies questions of Federal law which have not been but which should be settled by this Court.

2. The decision herein directing a new trial on the basis of newly discovered evidence, outside of the record on appeal, after judgment reversing petitioner's conviction and directing his discharge, departs from the accepted and usual course of judicial proceedings and violates petitioner's rights under the Fifth Amendment to the United States Constitution, in that it places him twice in jeopardy for the same offense.

3. The decision herein is in conflict with the decision of the Ninth Circuit, in *Karn vs. United States*, 9th Cir. 158 F. 2d 568, holding that the only proper disposition of an appeal under similar circumstances is to direct the trial court to enter judgment of acquittal.

4. To grant a new trial upon allegedly newly discovered evidence, outside of the record on appeal, after entering judgment directing petitioner's discharge, exceeds the appellate jurisdiction of the Court of Appeals, and so far departs from the accepted and usual course of judicial proceeding as to call for an exercise of this Court's power of supervision.

5. The decision herein appears to be in conflict with applicable decisions of this Court.

STATEMENT OF THE CASE

The Judgment of the Court of Appeals sought to be reviewed amended its original Judgment directing dismissal of the indictment to direct a new trial (R. 176).

Petitioner was convicted upon the first count of an indictment, charging conspiracy to defraud the United States in violation of 18 U.S.C., Section 371 (R. 5, 10). The conspiracy charged was to avoid payment for a quantity of aluminum purchased by petitioner and being property of the United States (R. 2, 3). Petitioner moved for judgment of acquittal, (R. 5, 117, 120), but no alternative motion for a new trial was submitted to the trial court (R. 9).

The Court of Appeals reversed because the evidence was insufficient to support the verdict in that there was no evidence to show that petitioner knew he was dealing with Government property (R. 159-163).

The original Judgment of the Court of Appeals directed dismissal of the indictment (R. 164). The Government petitioned to amend the Judgment so as to grant a new trial on the ground of newly discovered evidence (R. 165).

Petitioner opposed the request for a new trial (R. 167). Thereafter, the Government filed an ex parte Affidavit, not served upon petitioner's counsel, (R. 169), itemizing the alleged newly discovered evidence. On the basis of said Affidavit the Court of Appeals entered its Order amending its original Judgment and directing a new trial (R. 176). Petition for re-hearing was filed and denied (R. 178, 181). Mandate was stayed pending Petition for Certiorari (R. 181).

Federal jurisdiction in the Court of first instance was based on Title 18, U.S.C. 3231.

ARGUMENT

I.

THE COURT OF APPEALS EXCEEDED ITS JURISDICTION

Courts of Appeals are courts of limited jurisdiction. They have only appellate, as distinguished from original, jurisdiction. Title 28 USC 1291. The Government's petition to amend the Judgment so as to direct a new trial in essence was a motion for new trial on the ground of newly discovered evidence. To entertain such a motion and consider in connection therewith evidence outside the record on appeal is the exercise of original and not appellate jurisdiction.

The Court of Appeals for the Tenth Circuit has held that it has no power to pass originally upon a motion for a new trial. *Hall vs. United States*, 10th Cir. 78 F. 2d 168 (1938). See also *Heald vs. United States*, 10th Cir., 175 F. 2d 878, at 883, (1949). In disposing of an appeal, a Court of Appeals is limited to the record before it and should not consider extraneous statements. *Beeler vs. United States*, 5th Cir. 205 F. 2d 454 (1953). *Starke vs. New York, Chicago and St. Louis R. Co.*, 7th Cir. 180 F 2d 569 (1950). In basing its disposition of this case upon evidence outside of the record on appeal, the Court of Appeals exceeded its appellate jurisdiction.

II.

THE ACTION OF THE COURT OF APPEALS IN DIRECTING A NEW TRIAL WAS LEGALLY ERRONEOUS

The Government's petition for a new trial on the basis of newly discovered evidence, after judgment of the Court of Appeals had been entered reversing petitioner's conviction and directing dismissal of the indictment, was not timely,

and the showing in support thereof was legally insufficient to justify direction of a new trial. Assuming for the purpose of this argument that the Court of Appeals had power to entertain the Government's application, its action thereon so far departs from the accepted and usual course of judicial proceedings as to call for an exercise of the supervisory power of this Court. If such a power exists, it should be exercised only in accordance with the established law governing new trials for newly discovered evidence, and only under the most unusual circumstances. *Silva vs. United States*, 9th Cir. 38 F. 2d 465 (1930).

The Government's affidavit fails to show when the evidence was discovered, and further fails to show any reasonable excuse for not producing the evidence at the trial. No diligence is shown, and the implications are that diligence was entirely lacking. All of the information relied upon was within the personal knowledge of witnesses who testified at the trial. Petitioner's Motion for acquittal at the conclusion of the Government's case advised the Government of the insufficiency of its evidence (R. 117). Under these circumstances, the showing was insufficient as a matter of law to justify a new trial. *Heald vs. United States* (Supra). *Johnson vs. United States*, 8th Cir. 32 F. 2d 127 (1929). *Evans vs. United States*, 10th Cir. 122 F. 2d 461 (1941). With its extensive facilities and powers for investigating and prosecuting crimes, the Government should be held, at the very least, to the same standards of diligence which the law imposes upon an individual accused.

Under Rule 29 (b), Federal Rules of Criminal Procedure, the primary discretionary responsibility for granting a new trial for newly discovered evidence, or on the record already made, is vested in the trial court. The action of the Court of Appeals in itself directing a new trial deprives the trial court of the exercise of its discretion. See *Cone vs.*

West Virginia Pulp & P. Co. 330 US 212, 91 L Ed 849, 67 S Ct 752. *Wagner vs. United States*, 9th Cir. 118 F. 2d 801 (1941).

III.

DIRECTING A NEW TRIAL UNDER CIRCUMSTANCES OF THIS KIND VIOLATES THE CONSTITUTIONAL PROHIBITION AGAINST DOUBLE JEOPARDY

In the case of *Bryan vs. United States*, 338 US 552, 94 L Ed 335, 70 S Ct 317 (1949), this Court held that there was no double jeopardy under the Fifth Amendment to the Constitution of the United States upon a second trial, where an accused himself obtains a reversal of his conviction. That case is not controlling here.

In the *Bryan* case the petitioner himself had asked for a new trial and that request for relief was properly pending before the Court of Appeals. In this case no request for a new trial was involved in petitioner's appeal. The Court of Appeals entered Judgment directing dismissal of the indictment on the ground that the evidence was legally insufficient to sustain the conviction and that the trial court should have entered judgment of acquittal. The Order modifying the Judgment so as to direct a new trial was based upon new and additional evidence outside of the record made below. It is submitted that such procedure violates the constitutional prohibition against double jeopardy, and that the question has not been decided by this Court.

Had the jury returned a verdict of acquittal the Government could not have obtained a new trial. Had the trial court entered judgment of acquittal, as it was required by law to do, the Government could not have obtained a new trial. *Ex parte United States*, 7th Cir. 101 F. 2d 870 (1939). To permit the Government to obtain a new trial, on evidence

outside of the record, after the Court of Appeals has rightly decided that the defendant, as a matter of law, should go free, is the equivalent of permitting the Government to obtain a new trial after a judgment of acquittal and, it is submitted, violates the constitutional prohibition against double jeopardy.

IV.

THE DIRECTION OF A NEW TRIAL IS NOT AN APPROPRIATE AND JUST JUDGMENT UNDER THE CIRCUMSTANCES OF THIS CASE

In the *Bryan* case, *supra*, this Court held that the determination of a case by the Court of Appeals was governed by Title 28 USC, Section 2106, set out in full above. The Court did not in that case reach the question of under what circumstances the judgment of acquittal is warranted or required by said Section.

The decision of the Court of Appeals amending its Judgment and directing a new trial is in conflict with the decision of the Ninth Circuit in the case of *Karn vs. United States*, 158 F. 2d 568 (1946), holding that where an accused's right to an acquittal, as a matter of law, had fully matured in the trial Court, the only proper disposition of the appeal was to direct the judgment which the trial Court should have entered. See also *United States vs. Gardner*, 7th Cir. 171 F. 2d 753 (1948). *Williams vs. United States*, 5th Cir., 216 F. 2d 350 (1954).

The *Bryan* case is not dispositive here, since in that case petitioner was asking the Court of Appeals for a new trial and the circumstances which made granting a new trial an appropriate judgment, under Section 2106, Title 28 USC, were contained in the record on appeal. In the instant case no motion for a new trial was presented to the District

Court, nor was any such motion by petitioner before the Court of Appeals.

Under Rule 29 (a) Federal Rules of Criminal Procedure, petitioner was entitled to a judgment of acquittal as a matter of law at the close of the Government's case. The Court of Appeals has so held, and the correctness of that holding is not challenged. The only appropriate method of correcting the error was to direct the District Court to enter the judgment which the law required it to enter. The discretion vested in courts of appeals by Section 2106, Title 28 USC is not unlimited, and as indicated by the remarks of Mr. Justice Minton, dissenting in *Johnson vs. New York, New Haven & Hartford R. Co.*, 344 US 48, 97 L Ed 77, 73 S Ct 125 (1952), the discretion should be exercised so as to dispose of the case according to law, on the record already made.

The action of the Court of Appeals raises a far more serious issue than the possible guilt of the petitioner. The issue is the proper standard to which the Government should be held in criminal prosecutions, by law and by the courts. To deprive a citizen of his liberty the law places upon the Government the burden of producing evidence legally sufficient to support a conviction. To discharge that burden, the Government is clothed with vast and ever-expanding powers of investigation. The law rightly says that if in any criminal case the Government fails to produce evidence which raises a jury issue, the defendant shall go free. In the absence of any excuse, reasonable or otherwise, for the Government's failure to produce its evidence at the original trial, to grant it another bite would violate fundamental concepts of what is right and fair. Such a disposition would reward and invite laxity, and tend to destroy the high standard of diligence to which the Government should rightly be held: To enforce the law and to sustain the principles upon which it

is based, the only appropriate disposition of this case, under Section 2106, Title 28 USC, was to direct petitioner's discharge.

CONCLUSION

It is respectfully submitted that the Petition should be granted, and the Writ issue.

BEN SAPIR

Petitioner

By SAM DAZZO

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A. H. McLEOD

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Albuquerque, New Mexico.

APPENDIX I

United States Court of Appeals

TENTH CIRCUIT.

No. 4912—SEPTEMBER TERM, 1954.

Ben Sapir,

Appellant,

v.

United States of America,

Appellee.

} Appeal from the United
States District Court
for the District of
New Mexico.

[October 20, 1954.]

John B. Tittmann and T. B. Keleher (A. H. McLeod was with them on the brief) for appellant.

Melvin L. Robins, Asst. U. S. Atty., (Paul F. Larrazolo, U. S. Atty., was with him on the brief) for the United States.

Before PHILLIPS, Chief Judge, and HUXMAN and MURRAH, Circuit Judges.

PHILLIPS, Chief Judge.

Sapir and one Canfield were charged by indictment with a conspiracy to defraud the United States in violation of 18 USCA §371. From a judgment and sentence on a verdict of guilty, Sapir has appealed.

The New Mexico Institute of Mining and Technology, located at Socorro, New Mexico, hereinafter referred to as the

Institute, pursuant to a contract with the United States Navy, was engaged in a research project involving airplane components and missiles. For reasons of military security the contract was "classified." Under the contract, the Institute was possessed of certain property of the United States used in connection with such research program. It was determined that certain aluminum and brass surplus should be sold as scrap. These materials were used in classified experimental work. The aluminum bore marks from which it could be readily recognized as property of the United States. The aluminum was smelted into ingots in order to destroy its identity and in order to make it unrecognizable as property of the United States and to maintain the secrecy of the classified experimental work. Canfield, who was purchasing agent for the Institute, in May, 1953, issued an invitation to bid on the following items: "Aluminum, resmelted, in ingot form" and "Brass, oil radiators, removed from aircraft." The bid form was on the letterhead of the Institute and was the standard form used by the Institute in its ordinary transactions and carried the notation "for sale by the N. M. Institute Mining & Technology, Socorro, N. M." The procedure used in the sale of the scrap was the normal procedure for the sale of property of the Institute. Sapir was the successful bidder. After he had signed the bid and returned it to the Institute, it was approved on May 19, 1953, by Commander J. F. Gill, Development Contract Officer and the Navy representative in charge of the program at the Institute. It was accepted by Canfield, the purchasing agent, on May 25, 1953. Both endorsements were placed on the bid after Sapir had returned it and he had no knowledge that it was approved by anyone other than the Institute. The notice of award of bid, which was sent to Sapir on May 25, 1953, was the regular Insti-

tute form and contained nothing to indicate that the United States was in any way involved in the transaction.

On June 12, 1953, Sapir removed 96,580 pounds of aluminum ingots and 2,998 pounds of brass from the property of the Institute by truck and loaded it into a railroad car. The Institute having no facilities for weighing the aluminum and brass surplus, it was agreed that the items would be paid for on the basis of railroad weights. Pursuant to an agreement between Canfield and Sapir, one truckload was not loaded into the railroad car, but was transported directly by truck from its location on the Institute property to a warehouse in Albuquerque. The following day, Sapir gave Canfield \$200. The Institute invoiced Sapir only for the 96,580 pounds of aluminum ingots and 2,998 pounds of brass, which were loaded into the railroad car. Canfield knew that the aluminum ingots and brass belonged to the United States.

An essential element of the offense charged was an intent to defraud the United States.¹ Sapir could not have intended to defraud the United States, unless he knew the property which he purchased belonged to the United States.

The sole question presented on this appeal is whether Sapir knew or had reason to believe that the property which he purchased belonged to the United States, and, therefore, could have intended to defraud the United States through his arrangement with Canfield to transport one truckload of the aluminum and brass directly to Albuquerque and thus avoid it being weighed and invoiced to him. It is manifest from the record that the Institute, at the direction of the representatives of the United States, went to great lengths to conceal the ownership of the property which was the sub-

¹*Salas v. United States*, 2 Cir., 234 F. 842, 845;
United States v. Jenks, D.C. Pa., 258 F. 763, 765.

ject matter of the sale. The United States relies upon certain circumstances to establish that Sapir knew the property which he purchased belonged to the United States.

Sapir had a prior purchase transaction with the Institute and he went to one Sweet and requested a refund of part of the purchase price paid. Sweet told Sapir any refund would have to be taken up with Commander Gill or Doctor Workman. Workman was the administrative head of the Institute. Sweet testified that after his conversation with Sapir, "We talked it over with Doctor Workman and Commander Gill and they agreed they would not hold him * * *." But, it is clear from the record that Sapir was not present when the matter was taken up with Commander Gill. Commander Gill testified that he first met Sapir on the day before the trial on the conspiracy charge and there is no evidence in the record that Sapir knew or had reason to believe that Commander Gill was in anywise connected with the sale of the property out of which the conspiracy charges grew.

The materials which were the subject matter of the sale were not materials ordinarily handled by the Institute. However, it is apparent that the Institute made two sales of such materials and in both transactions handled the property as if it were its own.

Of course, the research program and the sale of the materials were not normal activities of the Institute. But, it was a school of mines, and research, with respect to metals and metal products and the accumulation of metal scrap, was not so foreign to its normal functions as to lead a reasonable person to believe, under the circumstances surrounding the sale, that the materials did not belong to the Institute.

On the day that Sapir loaded the materials, an official United States Navy truck with the markings "U.S.N. 94-16278" was parked nearby. But, there was no evidence that Sapir had any knowledge that the truck was in anywise used in connection with the property sold.

The Institute had no facilities for weighing the materials and from that circumstance it is sought to draw the inference that the sale of the property to Sapir was not a normal activity of the Institute.

On July 29, 1953, an FBI agent talked with Sapir. Sapir asked the agent, "What is your interest in the case?" The agent replied that property of the United States was involved in the investigation. Sapir then stated, "I remember the deal. It is a closed case, is it not?" However, that conversation occurred long after the alleged conspiracy had been consummated.

It is well settled that an inference cannot be predicated upon another inference. Presumption cannot be superimposed upon presumption to reach a factual conclusion²

In order to warrant a judgment of conviction on circumstantial evidence, the facts and circumstances shown must be consistent with each other and with defendant's guilt and inconsistent with any reasonable theory of innocence.³

We are of the opinion that the proven circumstances, either separately or in their totality, were insufficient to warrant the jury in finding beyond a reasonable doubt that Sapir knew or had reason to believe that the property which was the subject matter of the sale belonged to the United States. Accordingly, we conclude that the evidence did not

²Rosenberg v. United States, 10 Cir., 120 F.2d 935, 937.

³Morgan v. United States, 10 Cir., 159 F.2d 85, 87.

establish an essential element of the offense charged and that the trial court erred in not sustaining the motion of Sapir for a directed verdict of not guilty and should have sustained the motion of Sapir for a judgment of acquittal notwithstanding the verdict.

The judgment is reversed and the cause remanded, with instructions to dismiss the indictment.

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In the Supreme Court of the United States

OCTOBER TERM, 1954

BEN SAPIO, PETITIONER

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF HABEAS CORPUS TO THE UNITED
STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WILLIAM H. ROBERTSON,

WILLIAM CLINTON, JR.,

SEYMOUR WEINSTEIN,

JOSEPH A. BARRY,

Attorneys,
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In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 534

BEN SAPIR, PETITIONER

v.

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE TENTH CIRCUIT*

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. 159, 176, Pet. App. 1-6) is reported at 216 F. 2d 722.

JURISDICTION

The judgment of the Court of Appeals as modified was entered on November 17, 1954 (R. 164, 176) and a petition for rehearing was denied on December 13, 1954 (R. 181). The petition for a writ of certiorari was filed on January 12, 1955. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether the Court of Appeals, after reversing petitioner's conviction and ordering dismissal of the indictment for insufficiency of evidence, had the power, on consideration of government affidavits as to evidence which would be offered on a retrial, to amend its judgment by directing a new trial.

STATUTE INVOLVED

28 U. S. C. 2106 provides:

The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

STATEMENT

In the United States District Court for the District of New Mexico, petitioner was convicted and sentenced (R. 5, 10) on an indictment (R. 2-3) charging a conspiracy to defraud the United States, by a scheme to bribe an agent of the United States and to steal a truckload of aluminum ingots belonging to the government.¹ Peti-

¹ Two counts of the indictment charging the bribery (18 U. S. C. 201) and the stealing of government property (18 U. S. C. 641) were stricken before the case was submitted to the jury (R. 119, 120).

tioner moved for dismissal of the indictment at the close of the government's case and offered no evidence (R. 116-119). On appeal, the Court of Appeals ordered the indictment dismissed (R. 164), holding that there was insufficient evidence of petitioner's knowledge that the theft was from the government. After the government's motion to amend the judgment, supported by affidavits as to newly discovered evidence on the question of intent (R. 165, 166, 169-173), the court amended its judgment and ordered a new trial (R. 176). Petitioner contends that the court had no power to amend its judgment for the purpose of taking that action.

ARGUMENT

That a Court of Appeals may grant a new trial despite its conclusion that an acquittal should have been directed below, was reaffirmed by this Court in *Bryan v. United States*, 338 U. S. 552.² Therein, the Court, ruling that Rule 29 (a), F. R. Crim. P.,³ was applicable only to the district

² This power had previously been exercised without question. *Wiborg v. United States*, 163 U. S. 632; *Clyatt v. United States*, 197 U. S. 207.

³ (a) MOTION FOR JUDGMENT OF ACQUITTAL.—Motions for directed verdict are abolished and motions for judgment of acquittal shall be used in their place. The court on motion of a defendant or of its own motion shall order the entry of judgment of acquittal of one or more offenses charged in the indictment or information after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses. If a defendant's motion for judg-

courts, held that the only criteria for the federal appellate courts are those of 28 U. S. C. 2106:

The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

Petitioner attempts to distinguish his situation from *Bryan* on the ground that, unlike *Bryan*, he did not ask for a new trial in either court (Pet. 9-11). Petitioner cites no authority for his contention, and it would seem that one appealing his conviction cannot thus limit the broad discretionary powers granted the courts of appeals.

The appeal raised the issue of the validity of the trial which resulted in conviction and, after finding error, the court had the right to make such disposition of the cause as justice demanded. By seeking reversal of his conviction, petitioner waived any possible claim of double jeopardy on a new trial. *Bryan v. United States*, 338 U. S., at p. 560.

Petitioner also argues that this case is distinguishable from *Bryan* in that here the court consid-

ment of acquittal at the close of the evidence offered by the government is not granted, the defendant may offer evidence without having reserved the right."

ered evidence not already made part of the record in determining whether to remand for a new trial. He urges that the court had no power to do so. (Pet. 7, 11-12.) However, in *Bryan*, the Court of Appeals directed a new trial because the majority thought "the defect in the evidence might be supplied on another trial." (See 338 U. S. at p. 559). Manifestly, if a court may direct a new trial on the basis of supposition that additional evidence may be found, it has power to do so on affidavits showing that such evidence does in fact exist. Cases cited by petitioner, where appellate courts have ruled that they have no power to consider motions for new trial, are inapposite, since they involved a motion for new trial in the court of appeals when the case itself had not been brought up on appeal,⁴ or similar motions for new trial by defendant-appellants where the courts of appeals had affirmed convictions.⁵

The disposition of the *Bryan* case shows clearly that the standard for an appellate court in determining whether to remand for a new trial is not, as petitioner argues (Pet. 7-9), the standard which governs a motion by a defendant for a new trial on the basis of newly discovered evidence.

⁴ *Horne v. United States*, 51 F. 2d 66 (C. A. 4).

⁵ *Heald v. United States*, 175 F. 2d 878 (C. A. 10), certiorari denied, 338 U. S. 859; *Wagner v. United States*, 118 F. 2d 801 (C. A. 9), certiorari denied, 314 U. S. 622, rehearing denied, 314 U. S. 713.

The standard is merely whether the interests of justice will be served by a remand for a new trial rather than for entry of judgment of acquittal. If an appellate court is of the opinion that the defect in the evidence may be corrected at a new trial, as in *Bryan* and as in this case, it may properly remand for such purpose. The direction for a new trial was therefore a proper exercise of the discretion of the Court of Appeals, and was "just" and "appropriate" in the circumstances.

CONCLUSION

For the reasons given it is respectfully submitted that the petition for a writ of certiorari should be denied.

SIMON E. SOBELOFF,
Solicitor General.

WARREN OLNEY III,
Assistant Attorney General.

BEATRICE ROSENBERG,
JOSEPH A. BARRY,
Attorneys.

FEBRUARY 1955.